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What Do the Panama Papers Teach Us About the Administrative Law of Corporate Governance Reform in Hong Kong?

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What Do the Panama Papers Teach Us About the Administrative Law of Corporate Governance Reform in Hong Kong?

Bryane Michael, University of Hong Kong and
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1 November 2017

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Abstract

A complex business environment calls for a flexible administrative law for the agencies that oversee corporations. No where illustrates this maxim better than Hong Kong, and its need to reform corporate regulations after the Panama Papers revelations. We describe how only a 'non-administrative' administrative law can best cope with the challenges facing the regulation of corporate governance. Such a flexible, results-oriented approach to administrative law develops new principles and tests, rather than gives civil servants instructions. Such an approach to corporate governance can facilitate the assessment of company governance, corporate disclosure, the self-regulation of professional groups like lawyers and accountants, as well as ensure corporations engage in 'legitimate economic purposes.' We engage with the literature, showing why such a flexible approach to administrative rulemaking would more likely reduce some of the government regulation and oversight problems exposed by the Panama Papers than previous approaches toward drafting and implementing administrative law (at least in this area).

Keywords: Hong Kong, corporate governance, non-administrative administrative law, presumption of disclosure, legitimate economic purposes.

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Introduction

The Panama Papers revealed serious defects in Hong Kong's corporate governance. Particularly, the scandal showed the lapses in the way Hong Kong's government regulates and checks its financial firms and professional services providers.¹ While Hong Kong's government has failed to conduct (or at least publicly release) a study looking at the harms of the Panama Paper revelations, the European Union has.² At first, the study looks like any other ordinary impact assessment – looking at the tax law, corporate law, and the regulation of financial institutions. Look more deeply though, and one sees a study about EU administrative law. The study looks at the rules the EU and its Member States' ministries of finance should put in place to deal with the way they (these government bodies) should regulate, inspect and so forth. In other words, how EU member states' (and the EU's in general) administrative law should change. Administrative law represents an unloved branch of public law. Yet, as the Panama Papers revelations show, the way government ministries, agencies, and even independent bodies invested with public power, regulate and investigate (or not) strikes at the heart of administrative law.³ The old days of administrative law as fixed, specific rules – given to civil servants and other public officials – are numbered.

In this paper, we argue that the changes needed to remedy the problems shown by the Panama Paper revelations require a new way of thinking about administrative law. That new way (actually not very new for many governments) involves regulating what public entities do and the goals of their work, rather than the way they do it. Government increasingly has (and takes) responsibility for the conduct of all kinds of groups in society – including companies. Government's role in influencing corporate governance shows how and why we need to re-conceive of administrative law as a law of ends, rather than means. Such law can encourage groups to assess corporate governance (or not), encourage disclosure (or not), self-regulate (or not), and even nudge corporate and other types of law toward focusing on legitimate ends rather than regulating conduct. Any conception of administrative law as simply listing an agency's rights and obligations sorely misses the need for ambiguity and flexibility in public administration (two features antithetical to the classic predictability-and-clarity way of

¹ For the full extent of the way that the Panama Papers shines a light on Hong Kong's regulation, see Moir, Jane, Panama Papers: What are the Implications on Hong Kong's "Anti-Money Laundering" Credentials?, *Hong Kong Lawyer* 6 July, 2016, available [online](#).

² See Blomeyer and Sanz, The Impact of Schemes revealed by the Panama Papers on the Economy and Finances of a Sample of Member States, *Policy Department D for Budgetary Affairs Study E 572.717*, 2017, available [online](#). Blomeyer and Sanz represents the name of a company, not two authors.

³ Interestingly, few studies look at the administrative law side of corporate governance. One of the more popular studies finds strong norms underlying, what appears on the surface, like regular rules and regulations governing the procedural and substantive rights of the regulated. We return to this theme throughout this paper. See Zumbansen, Peer, Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective, *Journal of Law and Society* 38(1), 2011, available [online](#).

understanding administrative law).⁴ Remedying the wrongs found in the Panama Papers will require rules far more results-focused and far less mechanical than most administrative law.

Each section of our paper illustrates how a more flexible, results-oriented view of administrative law (Hong Kong's in particular) can help remove the poor corporate governance identified by/in the Panama Papers. The first section presents data covering the major issues and problems for Hong Kong identified in the Panama Papers. The second section shows how government rules can encourage the practical, useful and accurate measurement of corporate governance quality. The third section discusses administrative law's role in encouraging corporate disclosure. Such a role revolves far more around encouraging private actors to act (or not) than controlling or checking companies. The fourth section describes the way administrative law can channel the incentives of self-regulating bodies, like lawyers and accountants. The fifth section most concretely illustrates the issues arising in the previous sections – in the form of a principles-based test for legitimate economic purposes. Government has certain ends to incentivize – often developing administrative principles or tests to help guide civil servants as they channel private sector incentives.⁵ Each of these sections describes a facet of such incentivisation. The final section concludes.

We ask for the readers' indulgence as we make our make our argument with the following limitations in mind. First, and most importantly, we do not make the case for or against such an approach to administrative law. We only try to observe the world – and draw conclusions about the approach which would most reduce the problems identified by the Panama Papers. Our tone reflects the outcome of that consideration – rather than any attempt to sell the reader on any particular approach. Second, we do not provide a classical literature review, showing how our understanding of the form and needs of administrative law have changed over time.⁶ Instead, we grapple directly with this evolving view of administration law's role in the broader legal framework through the four major reform areas identified by the Panama Papers. We apologise beforehand to any readers uncomfortable with our engaging the literature as we talk about changes in Hong Kong's rules and regulations – giving almost a “literature review on the fly.”⁷

⁴ Few in the field of public administration would dispute such a statement. The field of administrative law though, continues to see administrative action through 19th century lenses. For a analysis of the disconnect between the fields of administrative law and public administration, see Metzger, Gillian, Administrative Law, Public Administration, and the Administrative Conference of the United States, *George Washington Law Review* 83(4/5), 2015, available [online](#). Like us, Metzger uses financial law to most clearly illustrate this difference. See also Metzger, Gillian, Through the Looking Glass to a Shared Reflection: The Evolving Relationship between Administrative Law and Financial Regulation, *Law and Contemporary Problems* 78(2), 2015, available [online](#).

⁵ For one example, see Jackson, Vicki, Constitutional Law in an Age of Proportionality, *Yale Law Journal* 124(8), 2015, available [online](#). See also Poole, Thomas, Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights, *LSE Law, Society and Economy Working Papers* 9/2008, 2008, available [online](#).

⁶ We hardly need to provide such a review – given the wide-spread recognition of the failure of classical public administration and administrative law as branches of social science inquiry. See Bignami, Francesca, From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law, *Jean Monnet Working Paper* 01/10, 2010, available [online](#). See also Cassese, Sabino, New Paths for Administrative Law: A Manifesto, *International Journal of Constitutional Law* 10(3), 2012, available [online](#).

⁷ The fruitless discussion of ‘global administrative law’ illustrates the need to keep our discussion specific – without pontificating about general trends, while offering little in the way of concrete proof. For an example and discussion, see Ladeur, Karl-Heinz, The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law, *Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper*

Third, and relatedly, we do not survey every area of administrative law (or the public sector agencies in which such law holds reign).⁸ We use the specific area of law affecting corporate governance in order to illustrate broader trends affecting all areas of the public administration.⁹ We leave to the readers' good judgement and prior knowledge the extent to which our analysis covers changes to the broader administrative field.¹⁰ Fourth, we write about prescriptive change in Hong Kong – describing the way law should effect normative rather than positive change. In other words, and parroting the literature we review, we talk certain reforms almost as a *fait accompli*. We do this to focus our paper on our main argument, dealing with the way our conception of administrative law must change, rather than weighing the pros and cons of each reform.¹¹

What the Panama Papers Reveal About Hong Kong's Failure to Regulate

Hong Kong belongs to a network of offshore financial centres – some of whom sometimes help launder ill-gotten gains. Figure 1 shows the jurisdiction of incorporation and number of companies listed on Hong Kong's stock exchange. The British Virgin Islands plays a key role in Hong Kong's foreign investment and incorporation business. Hong Kong could plausibly attract productive companies from the US, UK, Singapore, and the Mainland to list on its stock market. But what productive enterprise needs investment in the Cayman Islands, the BVI or Liberia? The Mossack Fonseca hack revealed Hong Kong's importance in the wider networks of offshore companies cycling money to each other.¹² Yet, given the wide-spread adoption of anti-money laundering and related regulations across the financial centres, combined with low taxes in many jurisdictions nowadays, one must ask what benefits do Hong Kong companies get from

No. 16/2011, 2011, available [online](#). See also Stewart, Richard, U.S. Administrative Law: A Model for Global Administrative Law?, *Law and Contemporary Problems* 68(Summer), 2005, available [online](#).

⁸ Bingham for example tries (maladroitly) to deal with this problem by finding common values across administrative laws. See Bingham, Lisa, The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance, *Wisconsin Law Review* 297, 2010, available [online](#).

⁹ The literature commonly uses such an approach for tackling such a large and ambitious project. For just one example, in this case using environment-related administrative law to illustrate broader themes in administrative law, see Biber, Eric, Adaptive Management and the Future of Environmental Law, *Akron Law Review* 46(4), 2013, available [online](#).

¹⁰ For example, many US analysts see administrative law transforming as the result of judicial activism (basically power grabbing) – rather than as coping with an increasingly complex business/social environment. We do not try to present or evaluate these claims – which obviously partly explain Hong Kong's own regulatory paroxysms. See Rodriguez, Daniel and Barry Weingast, The "Reformation of Administrative Law" Revisited, *The Journal of Law, Economics, and Organization* 31(4), 2015, available [online](#).

¹¹ As Howson does, we forgo judging particular corporate governance reforms to look at their effect on law in general. See Howson, Nicholas, 'Quack Corporate Governance' as Traditional Chinese Medicine – The Securities Regulation Cannibalization of China's Corporate Law and a State Regulator's Battle Against Party State Political Economic Power, *Seattle University Law Review* 37, 2014, available [online](#).

¹² See Kinetz, Erika and Kelvin Chan, Hong Kong Emerges as Hub for Creating Offshore Companies, *AP The Big Story April*, 2016, available [online](#).

incorporating elsewhere?¹³ Given Hong Kong's regulatory similarity with the BVI and other offshore centres, why would companies need these other offshore centres' services at all?¹⁴

Figure 1: Why Do We Accept Shells from BVI and Other Incorporation Mills?



Hong Kong's financial and company secretarial advisory institutions' participation in the offshore shenanigans elucidated by the Panama Papers shows why companies need these offshore centres.¹⁵ Figure 2 shows the sheer number of Hong Kong financial institutions and related parties identified in Papers.¹⁶ The Panama Papers data indicate that at least 12 offshore banks and 3 intermediaries in Hong Kong had dealings with Mossack Fonseca. These numbers may not appear large. But taking into account finance and securities companies as well, over 500 companies had a touch with Hong Kong. Some famous names include Deutsche Bank, Dah Sing Bank, HSBC, and Societe Generale. Both the Panama Papers, and numerous other studies, show

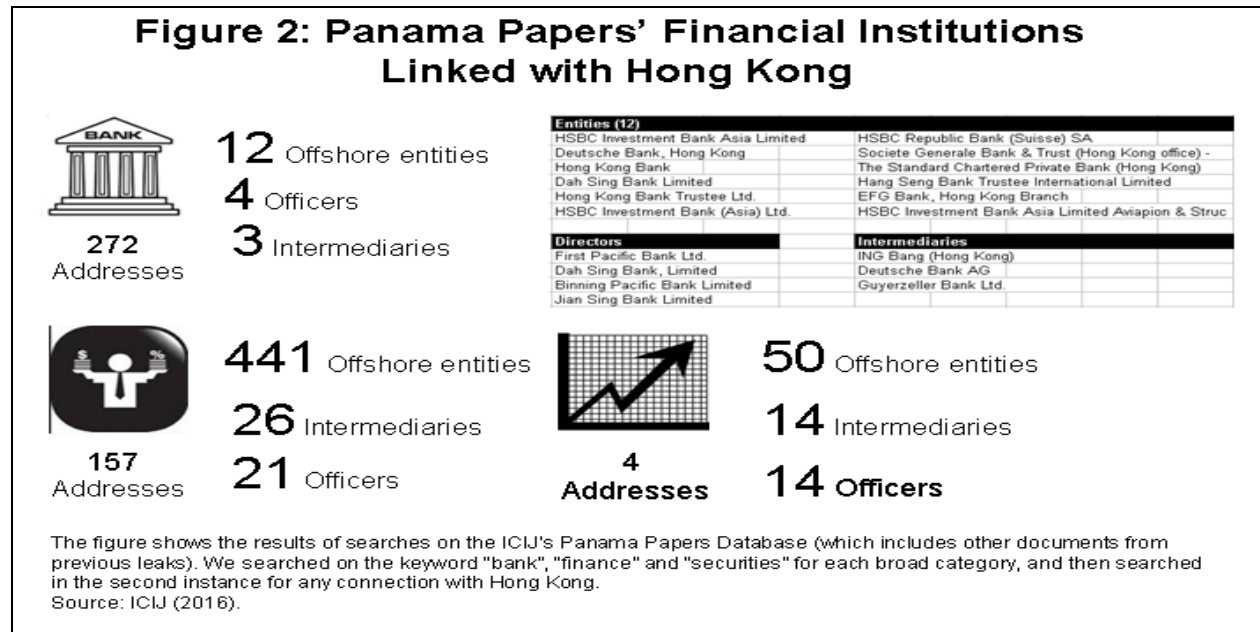
¹³ Most authors have already answered this question as evading national corporate and business laws. See Gordon, Richard, On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers, *North Carolina Law Review* 88, 2010, available [online](#). See also James McConvill, An Unstoppable Force Rather Than an Illegitimate Farce: Exploring the Role of Offshore Financial Centres Amid Renewed Criticism, *European Business Law Review* 25(6), 2014, available [online](#).

¹⁴ For more on this convergence, see Sharman, J., Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States, *International Studies Quarterly* 52(3), 2008, available [online](#).

¹⁵ Company secretary advisors consist of companies whose niche market focuses on providing corporations with advice on incorporation, filing corporate documents, accounting services, and even sometimes providing 'nominee' directors and shareholders. For more information on these providers, and the corporate secretary more generally, see Tricker, Bob, The Significance of the Company Secretary in Hong Kong's listed companies, *Hong Kong Institute of Chartered Secretaries Research Report A2336*, 2012, available [online](#).

¹⁶ The leak of the Panama-based law firm Mossack Fonseca's client data lead to revelations about the use of offshore companies. The wide-spread media attention paid to these data dubbed the circumstances leading to the use of Mossack Fonseca's services as the Panama Papers scandal. We refer to the Panama Papers data in this paper as data from the International Consortium of Investigative Journalists' (ICIJ) Offshore Leaks Database. The database includes information from the Panama Papers, the Offshore Leaks and the Bahamas Leaks. Yet, we refer to Panama Papers only as a short-hand for these combined search results to make our paper easier to read. See the International Consortium of Investigative Journalists, *The Panama Papers: Politicians, Criminals and the Rogue Industry that Hides Their Cash*, 2016, available [online](#).

how offshore companies can incentivise corporate managers and owners to engage in poor corporate governance practices. The recent World Bank study on shell companies, in particular, provides numerous examples of poor corporate governance practices facilitating the use of shell companies to siphon away money from these corporations themselves.¹⁷ A Basel Committee on Banking Supervision communiqué signed by several officials, even from tax havens themselves (such as Jersey, Bermuda, Cayman, and Guernsey), urged the closing of shell banks and offshore booking centres as early as 2003.¹⁸ These data and public statements illustrate the broader conclusion reached by academics themselves – that these offshore companies tend to undermine the quality of corporate governance.¹⁹



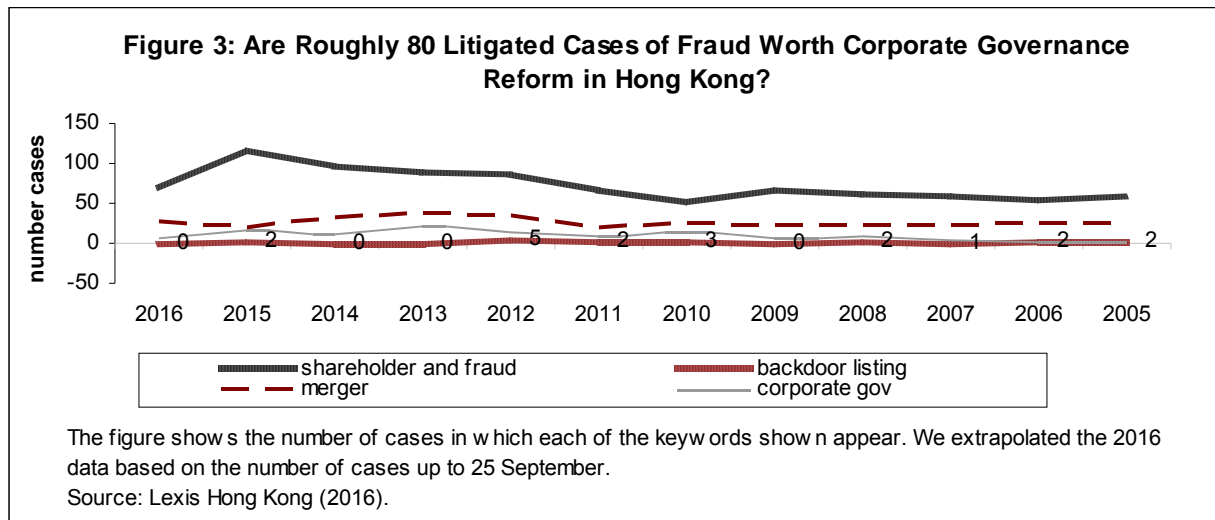
The lack of corporate governance-related disputes brought to court means that Hong Kong jurisprudence can not develop the same kind of legal innovations and doctrines which have arisen in the US and UK. Figure 3 shows the number of cases appearing in Hong Kong's courts due to poor corporate governance, fraud or disputes over mergers and so forth. Shareholder fraud represents the largest reason for litigation in Hong Kong's courts among the four factors we searched for – namely shareholder fraud, disputes over mergers, backdoor listings, and/or

¹⁷ See Willebois, Emily, Emily Halter, Robert Harrison, Ji Won Park, and J.C. Sharman, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It*, 2011, available [online](#). For example, Anglo-Leasing (Kenya) won a lucrative government tender to supply passport services at a cost five times higher than the lowest bidder. This UK mailbox-registered company subcontracted to the French firm who actually put in the lowest bid to do the work. In another case, investigators found that DaimlerChrysler Automotive Russia SAO sent improper payments to 25 bank accounts scattered around the world in order to engage in, and hide, bribe payments. Without these avenues to launder money, these firms' corporate governance might have been better.

¹⁸ Basel Committee on Banking Supervision, *Shell Banks and Booking Offices*, 2003, available [online](#).

¹⁹ In the longer working paper version of this article, we provide over 40 pages of our own and others' data showing the link between these offshore incorporations and the quality of corporate governance (as measured in numerous ways). See Michael, Bryane and Say-Hak Goo, *The Role of Hong Kong's Financial Regulations in Improving Corporate Governance Standards in China: Lessons from the Panama Papers for Hong Kong*, *University of Hong Kong Faculty of Law Research Paper No. 2016/048*, 2017, available [online](#).

corporate governance-related disputes.²⁰ Such disputes have increased very slightly, in absolute terms, over the course of the last decade. Yet, the lack of such cases means that, unlike in the US, these cases have created no law – administrative or otherwise – as a way of remedying corporate governance and other problems. If legal doctrines and concepts like ‘derivative actions’, ‘proper purpose’ and ‘corporate opportunity’ emerged from the crucible of litigation, then not enough cases go into Hong Kong’s crucible (courts) to dent law.²¹



The extent to which professional service providers aided in setting up the offshores which facilitated poor corporate governance shows the need for a broader policy response – and thus the action of public officials and civil servants guided by administrative laws. Figure 4 shows the percent of professional services firms accepting an approach to provide shell company incorporation services to an individual posing as a client engaged in illegal/unethical conduct.²² Hong Kong’s professionals refuse suspicious applications for shell companies far more often than other jurisdictions. Yet, as figure 5 shows, Hong Kong’s law firms lodge only a small fraction of suspicious transaction reports submitted by financial services firms...something every service provider must do under law.²³ Reducing the use of offshores to facilitate corruption -- or at the very least self-serving corporate behaviour by managers and owners -- will undoubtedly require

²⁰ For the last factor, we simply searched on the key word “corporate governance” – thus we do not try to dig too deeply into exactly what the experts categorize under that rubric.

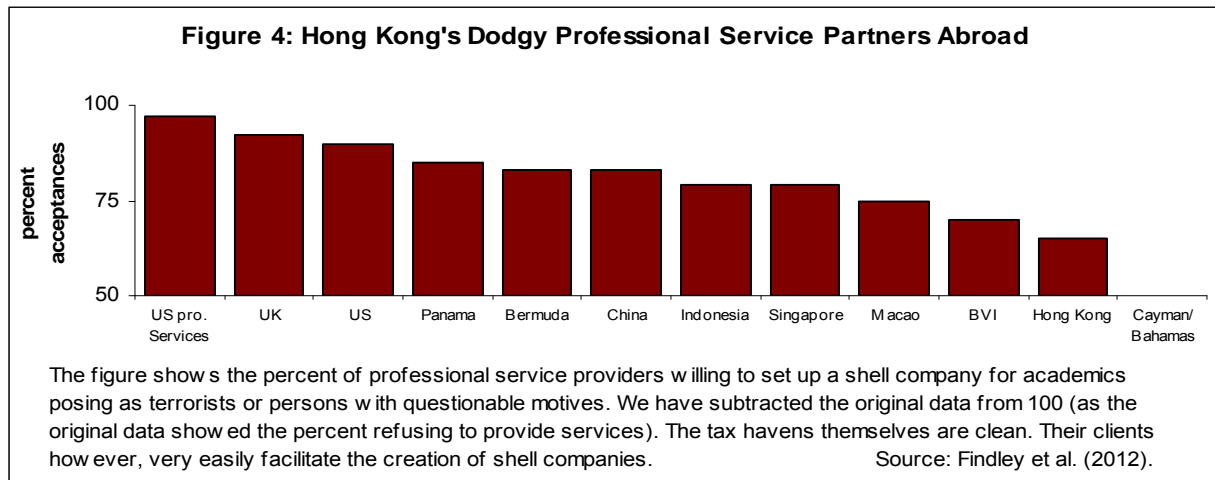
²¹ Clarke, Donald and Nicholas Howson, Pathway to Minority Shareholder Protection: Derivative Actions in the People’s Republic of China, In D. Puchniak, D., H. Baum, and M. Ewing-Chow, *The Derivative Action in Asia: A Comparative and Functional Approach*, Cambridge: Cambridge University Press, 2012.

See Chen, Wen-Jing, An Overview of Shareholder Litigation, In Chen, Wen-Jing, *A Comparative Study of Funding Shareholder Litigation*, Springer, 2017, at Chapter 2.

²² In the experiment, the individuals posing as clients hinted or even claimed they needed the company to move bribe payments for persons convicted of crimes for example. In other words, the person providing the incorporation services clearly knew the intended use (abuse) of the corporation. Most jurisdictions laws forbid incorporation service providers from serving these kinds of customers. See Michael Findley, Daniel Nielson, and Jason Sharman, *Global Shell Games: Testing Money Launderers’ and Terrorist Financiers’ Access to Shell Companies*, 2012, available [online](#).

²³ See Mulrenan, Stephen, Asia: Panama Papers – No News Is Good News, *International Bar Association’s Global Insight June/July*, 2016, available [online](#).

more government inspections, oversight and rules imposed on professional service firms.²⁴ Clearly, the administrative law governing the way financial regulators, professional services regulators, and risk-analysts in numerous government departments dealt with money laundering, self-serving by corporate insiders, and other corporate governance failures needs such revision.²⁵



These data from the Panama Papers show why Hong Kong needs a new and different conception of administrative law -- at least in financial and corporate affairs, if not more generally. Irregardless of whether Hong Kong's civil servants and businesses follow existing rules, Hong Kong financial institutions' and intermediaries' desire to create and use questionable offshore

²⁴ A recent policy brief produced by/for Hong Kong's Legislative Council shows the extent of such extra oversight. See Legislative Council Secretariat, Bills Committee on Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) (Amendment) Bill 2017 and Companies (Amendment) Bill 2017, *Legislative Council Paper No. CB(1)1456/16-17(08)*, 2017, available [online](#).

²⁵ The literature on Hong Kong's corporate governance rules extends too far to review here. For a discussion of some of the issues, see Lin, Yu-Hsin, Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control, *Columbia Business Law Review* 2017(2), 2017, available [online](#). If Hong Kong's corporate governance rules worked so well, why then would Mainland companies seek to comply with even harsher rules in order to attract investors? See also Meng Fang-Peng, Legal vs. Reputational Bonding: Board Independence of Chinese Companies Listed in Hong Kong, *CFRED Working Paper* 8, 2012 available [online](#).

corporations clearly represents a public policy issue. As we show in the following sections, de incentivizing activities which contribute to poor corporate governance requires administrative rulemaking which focuses on results – and provides civil servants with broader doctrines and tests, rather than specific rules of behaviour.²⁶ In other words, such an administrative law should be ‘non-administrative’ – namely far less bureaucratic, specific and rules-based.²⁷ Many of the principles eventually adopted in the private sector should start in administrative law (namely used in the public sector first).²⁸

Regulating Corporate Governance Indicators and Assessment

The assessment of the quality of corporate governance in Hong Kong and the Mainland represent more than just interesting data. Authors like Abbott and Snidal argue that governance systems have completely changed in recent years.²⁹ Calling the new system *Transnational New Governance*, these authors argue that the onus of regulation and enforcement has moved from government agencies to the wider business sector and civil society. Yet, as corporate governance survey work shows, academics and others conduct these assessments on an *ad hoc* basis – jeopardizing their comprehensiveness and repeatability.³⁰ Political concerns and the formality attached to official corporate governance peer reviews -- like those championed by the Financial Stability Board – distort the data too much to use in academic or policy settings.³¹ The Financial Stability Board has no apparent mechanism or funding source in place to ensure regular objective evaluation (ie. not simply asking government officials what they think about their jurisdiction’s corporate governance rules). The OECD’s review of corporate governance around the world ostensibly represents an excellent starting point for evaluating corporate governance rules in

²⁶ The literature has come to a consensus that principles-based administrative rulemaking is not an all-of-nothing proposition. Yet, finding the right balance between broader results-oriented rules, and specific rules of action for regulators and others, represents the key task. See Sama, Linda and Victoria Shoaf, Reconciling Rules and Principles: An Ethics-Based Approach to Corporate Governance, *Journal of Business Ethics* 58(1-3), 2005, available [online](#). See also Arjoon, Surendra, Striking a Balance Between Rules and Principles-based Approaches for Effective Governance: A Risks-based Approach, *Journal of Business Ethics* 68(1), 2006, available [online](#).

²⁷ Despite decades of calls for such administrative law, we refer to such law as non-administrative rather than enlightened, and share our peers’ views that current attempts to make administrative even more detailed represents a “scholarly dead end.” See Shapiro, Sidney, Elizabeth Fisher, and Wendy Wagner, The Enlightenment of Administrative Law: Looking inside the Agency for Legitimacy, *Wake Forest Law Review* 47(3), 2012, available [online](#).

²⁸ For example, many countries’ administrative law has evolved to include a precautionary principle, risk-based criteria and proportionality as part of core administrative doctrine. Many multinationals now use these principles when taking decisions. Who can say whether further evolution along these lines will lead to rules focused far more on outcomes than means/processes? See Jin, Zi-Ming, Introducing the Precautionary Principle into Administrative Law: Facing the Challenges to the Rule of Law, *Academia Sinica Law Journal* 19, 2016, available [online](#).

²⁹ See Abbott, Kenneth and Duncan Snidal, Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit, *Vanderbilt Journal of Transnational Law* 42, 2009, available [online](#).

³⁰ For one example of such an assessment, see Yan Leung-Cheung and Hasung Jang, Scorecard on Corporate Governance in East Asia: A Comparative Study, In Choi, Jay and Sandra Dow (ed.) *Institutional Approach to Global Corporate Governance: Business Systems and Beyond* 9, 2008, available [online](#).

³¹ The ‘assessment’ consists of asking government officials from each jurisdiction what they think about the various corporate governance rules in place in their jurisdiction. For more on the Financial Stability Board’s intention to engage in such corporate governance peer review, see FSB, FSB launches peer review of the G20/OECD Principles of Corporate Governance and Invites Feedback from Stakeholders, *FSB Communication* 19/2016, 2016, available [online](#).

Hong Kong.³² Yet, these evaluations fail to gather information about the implementation and effects of these corporate governance rules. Many even criticize assessments based on codes of corporate governance developed directly or indirectly (through their work on OECD, CSLA and other assessors') by the companies being assessed themselves.³³

The most obvious way to rectify such a lack of objective measurement consists of encouraging a government or quasi-government body to conduct such measurement – and thus invoking the need for administrative law-making. The simplest approach to such law might consist of “crowding in” such assessment from a credible third-party – like the OECD’s Centre for Cooperation with Non-Members.³⁴ The OECD has increasingly worked with regional institutions like the Asian Development Bank on corporate governance-related dialogue and meetings for the better part of a decade.³⁵ Unlike peer review done by the Financial Stability Board, and the OECD itself, such cooperation usually involves sending so-called experts to China and elsewhere, to make observations and ratings. Such cooperative arrangements though represent a bugbear for administrative law – in effect outsourcing activities to foreign entities.³⁶ These experts often can not escape the politicisation of the institutions they do these studies for – in effect making them not-very-expert.³⁷ While expedient in the short-term, such contracting-out can impair a government’s own long-term efforts at monitoring.³⁸ More damningly, these principles may not even apply – in part or at all -- to China (where more than 50% of Hong Kong’s listed companies hail from).³⁹ Worse still, these reviews make no administrative law by targeting assessment on irrelevant things, using someone else’s non-appealable procedures.⁴⁰

³² Nozaki provides a broad overview corporate governance regulations, while the OECD deals in-depth with the specific topics of related party transactions, takeover bids and shareholder meetings. See Nozaki, Akira, *OECD Corporate Governance Factbook*, 2015, available [online](#). See also OECD, *Supervision and Enforcement in Corporate Governance*, 2013, available [online](#).

³³ We talk about the potential influence on CSLA (one of the funders of the Asian Corporate Governance Association’s assessments) later. For a discussion of such influence and the way assessing these codes bypasses the main issues, see Sjaafjell, Beate, When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes, In du Plessis, Jean and Chee-Keong Low, *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analyses*, Springer, 2017.

³⁴ See OECD, *OECD Global Relations: Engaging with Non-Member Economies*, 2016, available [online](#).

³⁵ For background and information on the latest meeting, see OECD, *OECD-Asian Roundtable on Corporate Governance*, 2016, available [online](#).

³⁶ See Morais, Herber, The Quest for International Standards: Global Governance vs. Sovereignty, *University of Kansas Law Review* 50, 2001, available [online](#).

³⁷ See Halliday, Terence, Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations, *Center on Law and Globalization Research Paper No. 11-08*, 2011, available [online](#).

³⁸ For a description of these problems in the areas of financial standards and codes, see Mosley, Layna, Regulating Globally, Implementing Locally: The Financial Codes and Standards Effort, *Review of International Political Economy* 17, 2010, available [online](#).

³⁹ If Cardona and Farnoux complain that emerging markets must participate more fully in the elaboration of these principles and codes, Wang notes the completely failure of these codes to address the way that non-compliance helps the government or powerful persons. See Cardona, Michel and Marc Farnoux, International Codes and Standards: Challenges and Priorities for Financial Stability, *Financial Stability Review November*, 2002, available [online](#). See also Wang, Jiang-Yu, The Political Logic of Corporate Governance in China’s State-Owned Enterprises, *Cornell International Law Journal* 47(3), 2014.

⁴⁰ See Chen, Victor, Jing Li and Daniel Shapiro, Are OECD-prescribed “good corporate governance practices” really good in an emerging economy?, *Asia Pacific Journal of Management* 28(1), 2011, available [online](#).

The establishment of a local entity with over-sight competencies for these assessments, but without the actual obligation to carry them out, might pose the best hope for developing administrative law in this area. The Financial Services Development Council represents a quasi-government group tasked with, among other things, doing these kinds of surveys.⁴¹ Such evaluation would help develop Hong Kong's administrative law by requiring the development and assessment of rules for the Council to conduct these surveys. The US's recent review of their survey regulations provides both government officials and outsiders with knowledge about those procedures (increasing transparency) and the ability to change/improve them (improving performance).⁴² Such regulation serves an instrumental purpose in the US Evidence-Based Policymaking Commission's work.⁴³ Such work may seem simply mechanical or instrumental. Yet, as a Norwegian law review recently noted, even simple procedures for collecting data may comprise an 'algorithm' (albeit a very simple one) which increasingly guides government activity and behaviour.⁴⁴ These algorithms seek particular outcomes – so why regulate the means rather than the ends of their action?

To what extent would administrative law direct an informal body like the Financial Services Development Council and its possible survey work? The Financial Services Development Council itself represents a body which many would not consider a government agency capable of generating citable administrative law.⁴⁵ The Council has members who may adopt administrative law in their own government departments. The government relies heavily on work by similar councils (often constituted for political reasons).⁴⁶ Because their decisions and resources never seem controversial enough to challenge in court, we do not have an official ruling about the extent of their legality (namely whether they can provide public services, take over work done by others, etc.).⁴⁷ While increasing interest has emerged in reforming these councils and quasi-governmental bodies, academics still can not agree on whether governments had ever vested legal authority into them (except perhaps as contractors in providing services that businesses could also provide).⁴⁸ Clearly, the law regulating the Council's work must -- and does -- regulate the

⁴¹ Specifically citing the Council's Terms of Reference requires the Council, "to conduct policy research and industry surveys for the formulation of proposals to the Government and regulators." Hong Kong Financial Services Development Council, *Terms of Reference*, 2013, at point 1 (as cited on their [website](#)).

⁴² US Office of Management of the Budget, Privacy and Confidentiality in the Use of Administrative and Survey Data, 2013, available [online](#).

⁴³ See Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, § 4, 130 Stat. 317, 318.

⁴⁴ Schartum, Dag, Law and algorithms in the public domain, *Nordic Journal of Applied Ethics* 10(1), 2016, available [online](#).

⁴⁵ As of this writing, the informal body – composed of civil servants – has a request in place to officially hire non-civil servant staff. See Item For Establishment Subcommittee of Finance Committee, *EC(2016-17)20*, 2017, available [online](#).

⁴⁶ For an easy to read and understandable overview, see Van Der Kamp, Jake, Does Hong Kong really need so many obscure and antiquated 'specialist' bodies?, *South China Morning Post* Sept. 27, 2017, available [online](#).

⁴⁷ Despite extensive classification of these bodies and their lawmaking powers, the literature still has not reached any consensus on what the limits of these quasi-autonomous non-governmental organisations' competencies. See Marique, Yseult, The Rule-Making Powers of Independent Administrative Agencies ('QUANGOs'): Comparative Analysis in Fifteen Countries, *Electronic Journal of Comparative Law* 11(3), 2007, available [online](#).

⁴⁸ See Dommett, Katharine, and Muir MacCarthaigh, Quango reform: the next steps? *Public Money & Management* 36(4), 2016, available [online](#).

ends of its work, rather than the way members and attached civil servants to the Council conduct that work.⁴⁹

What about leaving these assessments up to the market (and thus completely unregulated)? The most important tool at present for assessing corporate governance in Hong Kong (and possibly the whole Asian region) consists of the Asian Corporate Governance Association's (ACGA) and CSLA's *Corporate Governance Review*.⁵⁰ Figure 1 shows a sample of its latest rankings – from 2015.⁵¹ The organisation has published these assessments since 2003 – providing potentially comparative data for over 13 years.⁵² Such a track records beats hands-down other institutions, like the Asian Development Bank, which conducts one-off *ad hoc* assessments according to their popularity and funding.⁵³ Even the IMF has not been able to assess China's corporate governance.⁵⁴ At first glance, having the non-governmental sector do these assessments – according to their own rules and whims – looks like the way to go.

Figure 6: The CSLA-ACGA Corporate Governance Scores Provide a Possible Baseline for Future Assessments?

Market category scores: CG Watch 2014						
Market category scores (%)						
	Total	CG Rules & Practices	Enforcement	Political & Regulatory	IGAAP	CG Culture
1. = Hong Kong	65	61	71	69	72	51
1. = Singapore	64	63	56	64	85	54
3. Japan	60	48	62	61	72	55
4. = Thailand	58	62	51	48	80	50
4. = Malaysia	58	55	47	59	85	43
6. Taiwan	56	48	47	63	75	47
7. India	54	57	46	58	57	51
8. Korea	49	46	46	45	72	34
9. China	45	42	40	44	67	34
10. = Philippines	40	40	18	42	65	33
10. = Indonesia	39	34	24	44	62	32

Source: Asian Corporate Governance Association

⁴⁹ Indeed, call its organic regulation a “Terms of Reference” speaks volumes about the regulatory intent to focus on ends rather than means. The Council’s governance lies, not in a formal contract per se, but clearly an implicit contract allows the Council to work on public activities as long as certain ends emerge. For the theory of such governance and its fit in administrative law, see Bertelli, Anthony, *Governing the Quango: An Auditing and Cheating Model of Quasi-Governmental Authorities*, *Journal of Public Administration Research and Theory* 16(2), 2006, available [online](#).

⁵⁰ ACGA, Library - Regional Analysis - ACGA Reports, 2016, available [online](#).

⁵¹ See Jamie Allen, Asian Corporate Governance Association (ACGA) CG Watch 2014 – Market Rankings, 2015, available [online](#).

⁵² The authors note several changes in definitions which hinder attempts to compare scores across years. We have not assessed such comparability in-depth, so we do not talk more about it. See CG Watch, 2003, available [online](#).

⁵³ At least they follow they mainly follow the OECD Principles. See Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013-2014*, available [online](#). See also Asian Development Bank and ASEAN, *ASEAN Capital Markets Forum, Corporate Governance Scorecard: Country Reports and Assessments 2012–2013*, available [online](#).

⁵⁴ IMF, Reports on the Observance of Standards and Codes (ROSC) Corporate Governance Program, 2016, available [online](#).

China – Show ‘em the money

High CG BUYs/Low CG SELLs		
Company	CG Score (%)	Re-rating drivers
High CG BUYs		
Legend	71.1	Increasing premium for growth in an uncertain environment for equities. BUY.
Brilliance	69.5	Exceptional track record of value creation to continue with move into sedans. BUY.
CNOOC	61.3	Announcements of new discoveries will highlight value relative to global peers. BUY.
Low CG SELLs		
Southeast Power	29.9	Investments in financial services sector show a lack of management focus. SWITCH to GD Power.
China Everbright	33.0	Delays to listing of subsidiaries likely to halt the company's value creation efforts. U/PERFORM.
Shanghai Industrial	32.8	Investments in IT sector unlikely to boost company's poor value creation record in the short term. LT BUY.
CTIC Pacific	45.1	Ability to create value from telecom infrastructure investments under question. LT BUY.

Source: CLSA Emerging Markets

Independence from government – and thus administrative law – represents both a vice and virtue. The assessment organisation's need to attract clients represents a clear vice. The CSLA, an investment advisor, represents one of the Association's large funders. Judging by the ACGA's 2012 report, most of the assessment seems to revolve around general market trends, with one or two companies' cases described as examples.⁵⁵ Discussion of the 14 or so companies the report focused on contained 2-3 sentences, with information seemingly taken from the news.⁵⁶ A quick overview of the report suggests that the sponsoring organisations do not practice favouritism vis-à-vis powerful companies.⁵⁷ Yet, the incentives will always remain to provide assessments and consulting at the same time and to the same companies. Simply putting administrative law constraints on the ACGA's ratings work, if the Association receives government money, would only alter the degree (not the impact) of restrictions placed on the entity.⁵⁸ Sponsorship from a market regulator or market maker could significantly dull CSLA and ACGA's incentives to talk-up potential clients – even if potentially burnishing its credibility.⁵⁹

What about regulating such assessment through a regulated body? Could legislation or regulation change the Hong Kong Stock Exchange (HKEx) *Listing Rules* to encourage, or even require, participation in – and aid with -- such assessments?⁶⁰ Other institutions do not have the funding, interest in promoting market quality, and institutional support that the Exchange has.⁶¹ The HKEx earned HK\$8 billion in 2015.⁶² As shown in Figure 2, the HKEx also advertises at length its corporate social responsibility. If the HKEx supported the ACGA for \$1 million (roughly US\$128,000) annually, such money should be enough to pay for the social goods aspects of its

⁵⁵ CSLA and ACGA, CG Watch 2012 Corporate governance in Asia, 2012, at 69-73, available [online](#).

⁵⁶ Id at 75-76.

⁵⁷ Id at Figure 68 (China: Biggest CG gainers/decliners (alphabetical order)).

⁵⁸ Lee, Sang-Cheoul and Yun-Xia Wang, A Study on the Establishment and Transformations of Chinese Type Quangos, *International Review of Public Administration* 10(1), 2005, available [online](#).

⁵⁹ Study after study shows that attachment to government (and thus its administrative law) brings a certain amount of public trust and confidence – due to the possibility of democratic control. Gash and Rutter interestingly try to find the principles underlying the optimal level of such independent funding. See Gash, Tom and Jill Rutter, The Quango Conundrum, *The Political Quarterly* 82(1), 2011, available [online](#).

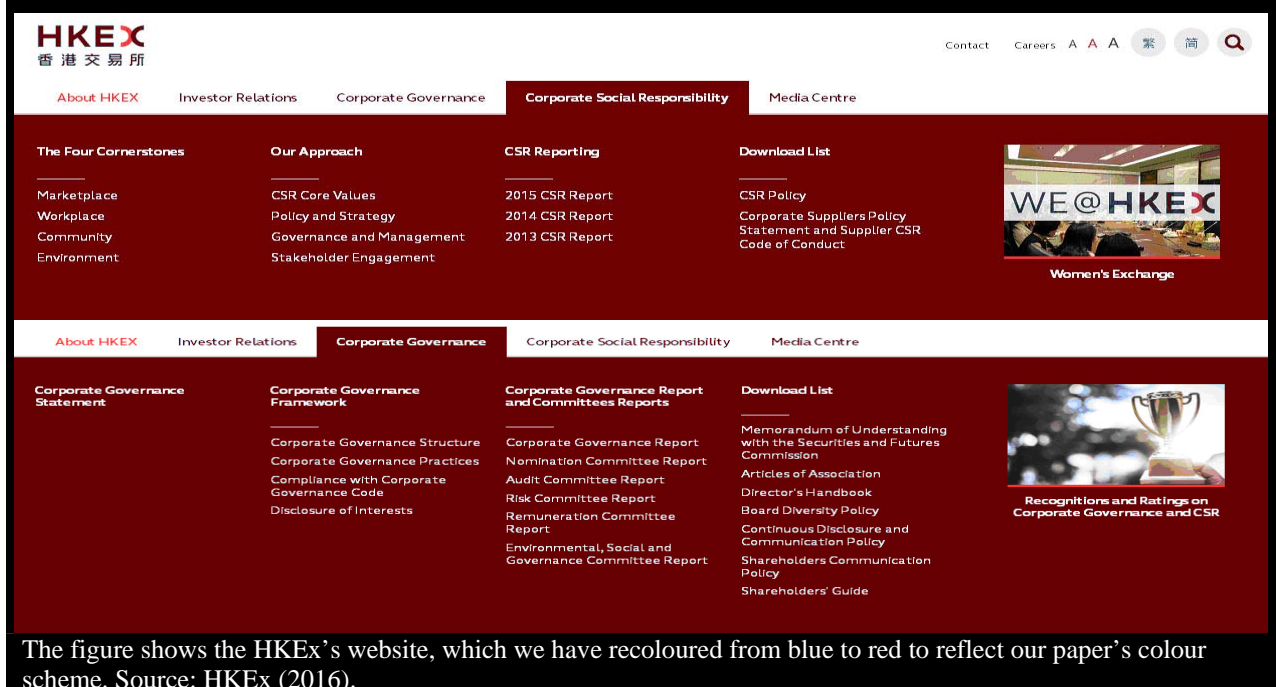
⁶⁰ See Hong Kong Stock Exchange, *Main Board Listing Rules*, available [online](#).

⁶¹ The Financial Services Development Council, research institutions at the local universities, and even the Company Register represent less desirable alternatives. In the case of the first two, they have no sustainable revenue source. In the latter, the conflict of interest obviously exists between register and assessor.

⁶² HKEx, 2015 Annual Report, available [online](#).

work. The Exchange has Community as a core value, as “help[ing] to build a sustainable community by supporting local initiatives that create effective and lasting benefits to the community.”⁶³ The HKEx should not have the right to influence assessments – even if these assessments might influence the Exchange and its members.⁶⁴ Indeed, having an Ordinance on the limits and authorisations allowable under/for such assessments – like the US has – would go along way toward developing Hong Kong’s own administrative law in this area.⁶⁵ Unlike in other cases where public authorities use independent assessments, the general investing public uses corporate governance assessments – ensuring these assessments’ “fair form and utilisation.”

Figure 7: The HKEx’s Commitment to Corporate Governance and Social Corporate Responsibility Makes it an Ideal Prospect for Funding Corporate Governance Assessments



⁶³ *Id* at CSR Policy, 2016, available [online](#).

⁶⁴ Influence represents a fascinating topic when dealing with quasi-independent agencies and entities. The US provides the most convincing proof that using administrative law (and related administrative disputes) provides the best way of deciding where the line between public and private should lie. In such law, the current standard consists of the requirement that independent bodies be fairly ‘formed and utilized.’ In other words, rules should ensure the independence of advisory/assessment group members (the ‘formed’ part of the phrase) and public bodies use their advice (the ‘utilized’ part of the phrase). See McCabe, Margaret, Assessing the Administrative Law Weaponry in the ‘War on Science,’ *Yale Journal on Regulation Notice and Comment*, 2017, available [online](#).

⁶⁵ Ordinances in Hong Kong represent the city’s own form of legislation. For more on the US’s statute, see Croley, Steven and William Funk, The Federal Advisory Committee Act and Good Government, *Yale Journal on Regulation* 14(2), 1997, available [online](#).

Disclosure-Biased Principles in Administrative Law (and Thus Corporate Law?)

Why would more disclosure ensure these assessments' 'fair form and utilisation'? In theory, the Listing Rules' requirement to publish enough information in corporate governance reports to allow for third-party assessment of corporate governance using the OECD Guidelines would encourage investors' and third party feedback.⁶⁶ The market for corporate governance information (investors, other stakeholders and regulators) would need to ensure 'fair form' (that assessments come from independent, well-rounded, unbiased and probably diverse sources).⁶⁷ In theory, market incentives ensure 'utilisation' by both companies (who react to assessments) and administrative bodies (who would regulate to solve market failures identified by low corporate governance scores).⁶⁸ But what in Hong Kong's administrative law might encourage disclosure?

One option consists of extending the doctrine of fiduciary trust developed over the decades in the public sector. Siebecker argues that increased disclosure could result from expanding fiduciary obligations on corporate executives.⁶⁹ Such an obligation would bring corporate executives' duty of care or public trust closer to that expected of a civil servant. Yet, for such a principle to work, such a trust/duty must evolve in the public administration itself, to the point where private sector equivalents might be theorised.⁷⁰ Not every one believes that such fiduciary duties to inform the public, for example, do or should extend to the private sector.⁷¹ Yet, if government sponsored enterprises represent a middle ground between public and private sectors, then clearly some middle ground must also exist vis-a-vis duties to corporate stakeholders (like the duty to disclose).⁷² If politicians feel the pulse of society's views on rights and duties, then rights and

⁶⁶ The literature provides too many studies of the regulator's role in encouraging investors to demand more information and/or better corporate governance practices. For a specific, legally- related example focused on the US, see Rock, Edward, Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure, *Cardozo Law Review* 23, 2002, available [online](#). For a general, more environment-based study outside the US, see Haniffa, R. and T. Cooke, Culture, Corporate Governance and Disclosure in Malaysian Corporations, *Abacus* 38(3), 2002, available [online](#).

⁶⁷ Almost too many corporate governance models and assessments exist to catalogue, from Moody's (a popular bond risk rating agency) to independent academic studies using their own bespoke criteria. No assessment of these assessments yet exists. In other words, we can not know which assessment "is better." The closest proxy consists of looking at information availability or other corporate governance metrics on the extent to which analysts predict company revenue, profits and other variables accurately. For one example, see Bhat, Gauri, Ole-Kristian Hope and Tony Kang, Does Corporate Governance Transparency Affect the Accuracy of Analyst Forecasts?, *Accounting and Finance* 46, 2006, available [online](#).

⁶⁸ For Sun and co-authors, the financial crisis represents its own indicator of poor corporate governance – one far more extreme than simple numbers on an assessment. See Sun, William, Jim Stewart and David Pollard, A Systemic Failure of Corporate Governance: Lessons from the On-going Financial Crisis, *European Financial Review* Feb, 2012, available [online](#).

⁶⁹ See Siebecker, Michael, Trust & Transparency: Promoting Efficient Corporate Disclosure through Fiduciary-Based Discourse, *Washington University Law Review* 87(1), 2009.

⁷⁰ Indeed, Criddle places such a trust at the centre of any solution to the agency problems affecting the effective exercise of administrative law. See Criddle, Evan, Fiduciary Foundations of Administrative Law, *UCLA Law Review* 54, 2006, available [online](#).

⁷¹ Davis particularly sees an insurmountable wedge between the very basis on which public versus private duties rest. See Davis, Seth, The False Promise of Fiduciary Government, *Notre Dame Law Review* 89(3), 2014, available [online](#).

⁷² For an attempt to theorise this middle ground, see Charles Cooper, Charkes, Todd Henderson, Troy Paredes and Mario Rizzo, Regulation of GSEs, Administrative Law, and Fiduciary Duties, *New York University Journal of Law and Business* 10, 2014, available [online](#).

duties in existing administrative law probably serve as the starting point for thinking about the way that corporate duties should evolve.⁷³

Clearly something prevents these norms from either working in Hong Kong's administrative law, or translating into the private sector. Figure 3 shows Hong Kong's own scores for financial transparency (or lack thereof).⁷⁴ As shown, Hong Kong ranks second worst among the jurisdictions polled for financial transparency. Hong Kong's unwillingness to sign up to several key international tax and anticorruption agreements represents one of the key reasons for Hong Kong's poor rating.⁷⁵ Hong Kong's large-scale overhaul of its money laundering rules probably makes part of this score too pessimistic. Yet, failing to sign up to key international transparency agreements represents a symptom rather than cause of secrecy. Behaviours typifying good corporate governance, like increased tax payments, increase as financial disclosures increase.⁷⁶ Hong Kong's lack of a disclosure culture in its corporate governance attitudes underpins most of the reasons for Hong Kong's bad financial secrecy scores.⁷⁷ Enriques and co-authors' idea of letting each company decide its own optimal disclosure requires some underlying norms best made in the crucible of administrative law and appeal.⁷⁸ Can administrative law help change this?

⁷³ As with any argument in this area, critics might argue that business – rather than the government – better reflects citizens' views and preferences. See Ponet, David, Ethan Leib and Michael Serota, Translating Fiduciary Principles Into Public Law: Responding to D. Theodore Rave, Politicians as Fiduciaries, *Harvard Law Review* 126(91), 2013, available [online](#).

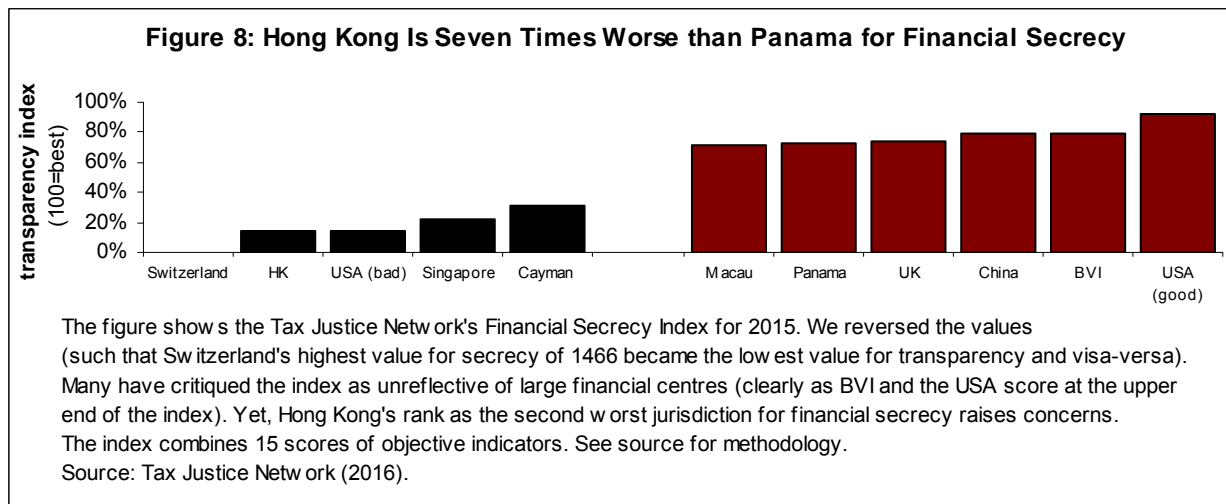
⁷⁴ Tax Justice Network, Financial Secrecy Index - 2015 Results, 2016, available [online](#).

⁷⁵ Signing on to international transparency commitments represents the 14th out of the 15 key financial secrecy indicators assessed by the Tax Justice Network. For exact scores, see Tax Justice Network, Financial Secrecy Index 2015 Methodology, 2016, available [online](#).

⁷⁶ Gupta, Sanjay, Lillian F. Mills, and Erin Towery, The Effect of Mandatory Financial Statement Disclosures of Tax Uncertainty on Tax Reporting and Collections: The Case of FIN 48 and Multistate Tax Avoidance, *Journal of the American Taxation Association* 36(2), 2014, available [online](#).

⁷⁷ Qu and Leung illustrate with data the close connection between Chinese disclosure culture and how Chinese firms conduct corporate governance. As disclosure norms change, so should the governance practices encouraging disclosure. See Qu, Wen and Philomena Leung, Cultural impact on Chinese Corporate Disclosure-A Corporate Governance Perspective, *Managerial Auditing Journal* 21(3), 2006, available [online](#).

⁷⁸ In other words, companies can not decide on these norms atomistically (for themselves) without a wider culture and shared understanding of rules decided during administrative and other disputes. See Enriques, Luca, Matteo Gargantini, and Valerio Novembre, Mandatory and Contract-Based Shareholding Disclosure, *Uniform Law Review* 15(3), 2010.



If directly writing rules and imposing them on companies won't work, what can lawmakers in a place like Hong Kong do? Hong Kong businesses and business schools can make the changes their UK and US peers have already made to introduce transparency into management speak and perspectives. The US adjusted, with its usual wave of management gurus and fads, extolling the virtues of transparency.⁷⁹ Consultants like PwC have already profited from turning the transparency fad into sellable services.⁸⁰ The UK has followed its consensual model – of having government coordinate the transparency effort.⁸¹ Given the importance of business groupings in Hong Kong, a pan-sectoral body like the Hong Kong Trade Development Council can/should cheerlead corporate transparency. Such cheerleading may include educating businesses about the benefits of transparency and disclosure. Such work may also consist of making industry standards and norms encouraging transparency according to each sector's own particularities. Most important, the relevant body can help reverse the presumption in most corporations that information should be concealed unless explicitly authorised to be publicly disseminated.⁸²

Stakeholders in the corporate ecosystem should prefer transparency because of the better decisions coming from perfect-ish information.⁸³ Authors like Dallas have noted that lack of

⁷⁹ Transparency cheerleading took place from the self-help management books to the panegyrics in *Forbes* and the other mainstream business media. See Tapscott, Don and David Ticoll, *The Naked Corporation: How the Age of Transparency Will Revolutionize Business*, 2003. See also Kirby, Julia, Trust in the Age of Transparency, *Harvard Business Review*, 2012, available [online](#). See also Patel, Neil, Why A Transparent Culture Is Good For Business, *Fast Company*, 2014, available [online](#). See also Knapp, Alex, In The Era Of Transparency, Trust Is The Key To Success, *Forbes*, 2012, available [online](#).

⁸⁰ PwC, Strengthen Trust and Transparency: Enhance Trust Across Your Network, 2016, available [online](#).

⁸¹ Department for Business Innovation and Skills, Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business, 2012, available [online](#).

⁸² Such a concept will not develop quickly. Even as late as 2014, the Hong Kong Institute of Certified Public Accountants was admonishing accountants and advisors to comply with even the minimums set by the Hong Kong corporate governance code. A new paradigm of openness seems light years away from their button-up analysis. See HKICPA, *A Guide on Better Corporate Governance Disclosure*, 2014, available [online](#).

⁸³ In theory, no information can be complete and perfect (as an economist would understand it). For an analysis of the incentives which drive information and corporate governance, see Bushman, Robert and Abbie Smith, Transparency, Financial Accounting Information, and Corporate Governance, *Economic Policy Review* 9(1), 2003, available [online](#).

transparency distorted corporate governance to such a degree as to contribute to the financial crisis of 2007-2008.⁸⁴ Against this background, corporate governance rules have increasingly moved away from requiring transparency for specific activities and toward a general “presumption of transparency” (that the company shall report and disclosure as the default option unless such disclosures cause harm).⁸⁵

Should a ‘reversed presumption of transparency/disclosure’ consist of a right to information? If such a right has made wide inroads in the public administration, corporate interest groups and bodies like The Hong Kong Trade Development Council (or other suitable body) could endorse the right to information as a core value in companies’ mission statements.⁸⁶ In the specific area of working conditions and information affecting consumers, many see business associations’ encouraging their companies to follow international laws, which their own countries have not yet adopted, as a way forward.⁸⁷ To that end, these business associations directly militate for increased transparency, or fund studies arguing for such transparency.⁸⁸ Even a submission to the EU Parliament recognises that the best way to influence such disclosure consists of using business associations to spread norms which are quickly developing in these countries’ own administrative law.⁸⁹ Reversing the presumption of confidentiality means agents of a business would consider all the information they produce or receive as publicly disclosable, unless labelled confidential – except in cases like accounting firms or law firms, where the business has no rights over the information ‘lent’ to it to do client work.⁹⁰ The needs for privacy differ between companies and individuals – with companies using such privacy for commercial advantage (or to protect the privacy of its agents).⁹¹ Such norms may (and should) encourage company agents to disclose the information which does not help a company’s competitive position, or information where the benefits of the public’s right exceeds the costs to the company.⁹² Just as administrative law has been evolving to deal with the benefits of the

⁸⁴ While most scholars agree about the lack of transparency in securitisation, most still do not agree on the extent to which opacity contributed to the crisis. Dallas might argue that lack of information leads to short-termism, as constrained information makes guessing about consequences more difficult. For a comprehensive analysis, see Dallas, Lynne, Short-Termism, the Financial Crisis, and Corporate Governance, *Journal of Corporation Law* 37, 2011, available [online](#).

⁸⁵ Such a presumption fits in with the corporate governance-as-relationship view that the 2014 UK Code of Corporate Governance adopts. See UK Financial Reporting Council, The UK Corporate Governance Code (September 2014), 2014, available [online](#).

⁸⁶ For such a strategy, and a discussion of this right’s progress in government, see Darbishire, Helen, Proactive Transparency: The Future of the Right to Information? A Review of Standards, Challenges, and Opportunities, *World Bank Governance Working Paper* 56598, 2010, Available [online](#).

⁸⁷ Kocher, Eva, Alexander Klose, Kerstin Huhn and Johanna Wenckebach, No Accountability without Transparency: Legal Instruments for Corporate Duties to Disclose Working and Employment Conditions, *Friedrich Ebert Stiftung Study*, 2012, available [online](#).

⁸⁸ See Forstater, Maya, Beneficial openness? Weighing the Costs and Benefits of Financial Transparency, *CMI Working Paper number* 3, 2017, available [online](#).

⁸⁹ See Curtin, Deirdre and Paivi Leino-Sandberg. Openness, Transparency and the Right of Access to Documents in the EU, *Citizens’ Rights and Constitutional Affairs Petition* PE 556.973, 2016, available [online](#).

⁹⁰ “Legal origins” (namely the type of law used in a jurisdiction) significantly determines a jurisdiction’s attitudes to such disclosure. For evidence, see Hope, Ole-Kristian, Firm-level Disclosures and the Relative Roles of Culture and Legal Origin, *Journal of International Financial Management & Accounting* 14(3), 2003, available [online](#).

⁹¹ For an excellent primer on such privacy, see Solove, David, Understanding Privacy, *The George Washington University Law School Public Law And Legal Theory Working Paper No.* 420, 2008, available [online](#).

⁹² Such norms can not conflict with established business and legal principles (namely the ‘business system’). Yet, these principles are not set in stone, and may change with intervention. See Millar, Carla, Tarek Eldomiaty, Chong-

‘collective processing’ of increasingly complex information, so should the rules governing corporate disclosure.⁹³ If all companies agree to release information, no one company will find itself disadvantaged.⁹⁴ At the very least, such a presumption of transparency will help reduce the extent of insider trading and other ills which bedevil Hong Kong’s exchanges.⁹⁵

Rulemaking by Hong Kong’s Securities and Futures Commission (SFC) could jostle such a change in administrative law toward stimulating a presumption-of-transparency culture. First, the SFC could adopt the spirit of the IOSCO principles, perhaps by issuing related broad guidelines.⁹⁶ While these principles deal with cross-border securities sales, they lay an important foundation for a general change in administrative jurisprudence, if adopted in Hong Kong’s principles-based regulation.⁹⁷ One can read and adopt the standards mechanically, without thinking about the deep, underlying reasons for these standards.⁹⁸ Yet, even once financial institutions and listed companies adopt those principles, analysts like Lu would have reforms of both the International Disclosure Standards and the IOSCO itself, as well as the IOSCO’s conduct of a “corporate governance impact assessment.”⁹⁹ Second, the SFC can continue implementing the Financial Stability Board’s and G20’s recommendations on disclosure.¹⁰⁰ Hong Kong’s authorities have noted numerous “planned steps” in their disclosure action plan. “Industry consultation” and “monitoring international developments” should focus on the final users of information, instead of just pushing disclosure for disclosure’s sake.

Other rulemaking by the SFC could help change the direction of administrative jurisprudence (and thus the way business regulates itself). In line with its mandate to monitor firms’ compliance with rules, including disclosure-related ones, the SFC could more actively assess and critique publicly-deficient disclosure practices.¹⁰¹ Private markets and civil society have no incentive or

Ju Choi and Brian Hilton, Corporate Governance and Institutional Transparency in Emerging Markets, *Journal of Business Ethics* 59(1-2), 2005, available [online](#).

⁹³ Wagner, Wendy, Administrative Law, Filter Failure, and Information Capture, *Duke Law Journal* 59(7), 2010, available [online](#).

⁹⁴ This is a fluid and quickly changing part of the law in developed economies. Steinman, for example, provides a fascinating glimpse into a recent US case involving the issues of disclosure and harm. A digression about the role of regulatorily mandated disclosure, the estimation of harms from non or incorrect disclosure, and judicial remedies would take us too far off topic. See Steinman, Joan, Spokeo, Where Shalt Thou Stand?, *Vanderbilt Law Review* 68, 2015, available [online](#).

⁹⁵ Such a presumption would reduce the headaches associated with complying with the new disclosure-of-inside-information rules. For a discussion of those rules and the judgment calls involved, see CSJ, Disclosure of Inside Information – An Update, *Journal of the Hong Kong Institute of Chartered Secretaries*, 2015, available [online](#).

⁹⁶ International Organization of Securities Commissions, *International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers*, 1998, available [online](#).

⁹⁷ As the SFC adroitly notes, “To address the fast changing market circumstances and practices, the Commission believes that, generally speaking, principles-based regulation that focuses on a higher level articulation of what the Commission expects intermediaries to do is more appropriate than a large volume of detailed standards.” See SFC, Regulatory Framework for Intermediaries, 2011, at point 29, available [online](#).

⁹⁸ For example, standard IV.A.1 relates to collecting the “name, business experience, functions and areas of experience in the company.” Such information clearly aids investors and analysts quickly understand the company. As such, the company should place the information in a prominent place with these readers/users in mind. See *Id.*

⁹⁹ Lu, Bing-Bin, International Harmonization of Disclosure Rules for Cross-Border Securities Offerings: A Chinese Perspective, *Corporate Governance Law Review* 1(2), 2005, available [online](#).

¹⁰⁰ See Financial Stability Board, FSB- G20 Monitoring Progress - Hong Kong, 2011, available [online](#).

¹⁰¹ Naturally, such law should respect the usual principles by which persons affected could appeal any administrative decision – such as fairness, proportionality, reasonableness and so forth. See Davydov, Konstantin, Judicial Control

resources to do such monitoring.¹⁰² Public censure also matches the objective of encouraging more transparency/disclosure – something in the regulator’s own interest. Indeed, the SFC’s disclosure team could advise the users, as well as the producers, of disclosable information. At present, the team answers questions from Hong Kong listed companies about what information they need to give out publicly. Yet, the users of such information far exceed the producers of such information.¹⁰³ Their small and scattered nature reduces the incentives of any one information user from militating for more disclosure. By offering a resource to information users, the SFC could lower the costs of encouraging disclosure/transparency. The SFC would also receive vital feedback from the market about where informational bottlenecks exist.¹⁰⁴ These rules validate Licht’s decades old call to end the distinction between public and private law in regulating corporate governance and disclosure – they are two sides of the same coin.¹⁰⁵

Using Administrative Law as a Lever for Self-Regulating Bodies

Nothing requires Hong Kong’s professional services firms to move toward a risk-based approach toward choosing clients. Under such a system, these service providers would try to detect high-risk clients with poor corporate governance practices. Nothing in the Solicitor’s Practice Ordinance requires solicitors to look at clients’ risks (or any kind of risks affecting the practice).¹⁰⁶ Hong Kong should follow the US’s “gatekeeper” approach to introducing risk-based assessment and risk management into the legal and other service professions.¹⁰⁷ The UK’s Solicitors Regulatory Authority and the UK Law Society have best “mainstreamed” such a risk-based approach into its legal services industry.¹⁰⁸ Moreover, the Authority issued new rules as part of its Handbook to move toward the wider adoption of principles-based, outcomes-based regulation.¹⁰⁹ Similarly, nothing in Hong Kong’s Professional Accountants Ordinance

over Discretionary Administrative Acts: The European Experience, *Open Questions in Public Law* 4, 2014, available [online](#).

¹⁰² A point Pargendler makes adroitly. See Pargendler, Mariana, The Corporate Governance Obsession, *Stanford Law and Economics Olin Working Paper* 470, 2014.

¹⁰³ Indeed, one of the main reasons for the existence of a regulator like the SFC stems from its ability to overcome collective action problems by requiring corporate disclosures which no one person or group has sufficient interest and/or resources to try and bargain for themselves. See Kahn, Faith, Transparency and Accountability: Rethinking Corporate Fiduciary Law’s Relevance to Corporate Disclosure, *Georgia Law Review* 4, 2000.

¹⁰⁴ Naturally, the SFC does not work in a vacuum – and its work would motivate other institutions to engage in oversight. For a discussion of the UK experience, see Cearn, Kathryn and Eilis Ferran, Non-Enforcement-Led Public Oversight of Financial and Corporate Governance Disclosures and of Auditors, *Journal of Corporate Law Studies* 8(2), 2008, available [online](#).

¹⁰⁵ Licht, Amir, International Diversity in Securities Regulation: Some Roadblocks on the Way to Convergence, *Harvard Law School John M. Olin Center for Law, Economics and Business Working Paper* 233, 1998, available [online](#).

¹⁰⁶ Specifically Rule 2 on general conduct does not mention the need of solicitors to identify or manage risks. See Solicitor Practice Rules, Chap 159H, 1997 (and updated several times subsequently), available [online](#).

¹⁰⁷ Shephard describes in great length all the various documents and initiatives created as a way to encourage lawyers to adopt the risk-based approach to money laundering and corporate malfeasance which is quickly becoming the norm in the services. See Shepherd, Kevin, The Gatekeeper Initiative and the Risk-Based Approach to Client Due Diligence: The Imperative for Voluntary Good Practices Guidance for U.S. Lawyers, 2010, available [online](#).

¹⁰⁸ The Authority has produced a number of clearly written, easily found reference materials describing the use of such a risk-based approach. See UK Solicitors Regulatory Authority, SRA Risk Framework, 2008, available [online](#). See also UK Law Society, The Risk-Based Approach – What Is It?, 2008, available [online](#).

¹⁰⁹ Aon Risk Solutions, Professional Services Group Risk Registers – A Practical Approach for Solicitors, 2013, available [online](#).

encourages the Hong Kong Society of Accountants or the Hong Kong Institute of Certified Public Accountants to adopt a risk-based approach as a means to accomplish one its primary tasks as to “discourage dishonourable conduct and practices by certified public accountants.”¹¹⁰ Even in the Companies Ordinance, nothing requires boards to set up risk committees or manage risks like staff complicity in money laundering or other financial crime.¹¹¹ While the Hong Kong Institute of Chartered Secretaries imposes risk-based guidelines on its members, the Institute makes no mention of internal rules about its own risk management practices (if any).¹¹²

The easiest way to encourage a risk-based assessment of clients and their engagements (work) consists of requiring Hong Kong’s law firms, accounting firms and corporate services firms to set up risk committees and a risk register – as well as adopt a risk-based approach to compliance.¹¹³ Specifically, lawmakers could eventually adjust the Solicitors Practice Ordinance, Professional Accountants Ordinance and the Companies Ordinance to reflect the obligation/right for professional services firms and company boards to adopt a risk-management perspective as way of dealing with compliance and risk – as well as scrutinize high-risk clients by extra monitoring.¹¹⁴ Institutions like the OECD have already taken on-board most academics’ view that risk assessment represents the best way to balance rules-based and principles-based corporate governance regulations.¹¹⁵ Unlike at present, such an approach would cover more than just money laundering.¹¹⁶ Such an approach would reduce the need for extensive and detailed regulations as well as costly compliance systems – thus saving listed firms and others money.¹¹⁷ Such an approach would also probably encourage compliance with corporate governance and other regulations.¹¹⁸ Yet, such an approach would need to start in administrative law – as civil servants and other administrators administer these requirements.¹¹⁹

¹¹⁰ See Professional Accountants Ordinance Chapter 50, 2004, at sec. 7, available [online](#).

¹¹¹ The only related requirement concerns directors’ disclosure of risks in their report. See Companies Ordinance, Chap. 622, at schedule 5, available [online](#).

¹¹² See HKICS, About Us, 2016, available [online](#).

¹¹³ Recent analyses of the global financial crisis of 2007-8 have particularly stressed the need to introduce broader risk management principles into company law and the sectoral rules governing the financial sector. See Sun, William Jim Stewart, David Pollard (Eds.), *Corporate Governance and the Global Financial Crisis: International Perspectives*, 2011.

¹¹⁴ See Solicitors Practice Ordinance, Chapter 159, available [online](#). See also Professional Accountants Ordinance, Chapter 50, available [online](#). See also Companies Ordinance, Chapter 622, available [online](#).

¹¹⁵ See OECD, *Risk Management and Corporate Governance*, *Corporate Governance*, OECD Publishing, 2014, available [online](#).

¹¹⁶ In contrast to the UK or US, most of our searches on risk-based approaches in Hong Kong yielded results only for banks and financial service firms and/or only for money laundering risks. See SFC, AML/CFT Self-Assessment Checklist, available [online](#).

¹¹⁷ The cost savings represent one of the key reasons for most professions (especially banking) to advocate such risk-based approaches. For a fuller description, see Ford, Christie, New Governance, Compliance, and Principles-Based Securities Regulation, *American Business Law Journal* 45(1), 2008, available [online](#).

¹¹⁸ We have already shown evidence that firms fail to comply with corporate governance and money laundering regulations because of their cost and complexity. Such a results-based, risk-oriented focus might thus lower costs and encourage compliance. See Harvey, Jackie, Compliance and reporting issues arising for financial institutions from money laundering regulations: a preliminary cost benefit study, *Journal of Money Laundering Control* 7(4), 2006, available [online](#).

¹¹⁹ Such administrative law has become increasing complex everywhere. For a fascinating discussion of how legislation – and related administrative rulemaking – has effected the professions in the US, see Backer, Larry, The Sarbanes-Oxley Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior, *St. John's Law Review* 76, 2002, available [online](#).

Yet, the way we analyse the Panama Papers and other scandals determines the way we think about designing the administrative law needed to tackle the problems these scandals highlight. Most analysts wrongly focus on legality of the structures and rules used by Mossack Fonseca and others to create and use offshore corporations – rather than the harm they cause.¹²⁰ They also wrongly focus on the narrow, specific harms of establishing offshore companies – in avoiding taxes for example.¹²¹ The inability of lawmakers to change the domestic legislation that allows intermediaries to set up offshore entities results from the wrong conclusions used by critics of these rules.¹²² As we already showed, the real harm resulting from the rules which enabled Mossack Fonseca stemmed from the opacity which enabled the no corporate governance of the offshore entities themselves and the poor corporate governance of companies associated with them.¹²³ As the ICIJ – the group who brought the Panama Papers to light – noted “the offshore system relies on a sprawling global industry of bankers, lawyers, accountants and these go-betweens who work together to protect their clients’ secrets. These secrecy experts use anonymous companies, trusts and other paper entities to create complex structures that can be used to disguise the origins of dirty money.”¹²⁴

Regulatory amendments should thus focus on the corporate governance consequences of intermediaries’ setting up offshore structures – and not on ethics or rule-following.¹²⁵ Indeed, in the more flexible US legal environment, focusing on these consequences led to the creation of anti-avoidance doctrines – which look at the intent of behaviour to circumvent rules for tax gain.¹²⁶ What role will intermediaries play in setting up and operating offshore companies when tax authorities around the world adopt “place of effective management” (or a similar test) when deciding on regulation and taxation?¹²⁷ The academic literature seems to show that, in the longer run, legal doctrines emerge – and lawmakers tend to ban these practices -- exactly because of scandals like the Panama Papers imbroglio.¹²⁸ Yet, codifying new laws and regulations (by trying to break-up these kinds of doctrines into specific admonitions to civil servants and others) adds to

¹²⁰ See Harrington, Brooke, Panama Papers: The Real Scandal Is What's Legal, *Atlantic Monthly* 6 April, 2016, available [online](#).

¹²¹ The Guardian represents one of the countless media outlets portraying the Panama Papers Scandal in a sombre light because of the negative effects these offshore entities had on tax collection. See Garside, Juliette, Fund run by David Cameron’s father avoided paying tax in Britain, *Guardian* 4 April, 2016, available [online](#).

¹²² Many administrative scholars have noted the extent of this problem – namely looking to add more procedures rather than looking at how rules address underlying mischief (problems). See Barnes, Javier, Towards a Third Generation of Administrative Procedures, *Comparative Administrative Law*, 2010, [available online](#).

¹²³ Some rules do focus on governance in particular areas – like fund management. Yet, the rules most concern offshore structures as investments rather than as companies in their own right. See Chambers, Mark and Darren Bacon, Offshore Funds: Committed to Corporate Governance, *PLC Magazine* April, 2012, available [online](#).

¹²⁴ ICIJ, Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption, 2016, available [online](#).

¹²⁵ Such a focus reflects a broader push in the social sciences to judge law by its systemic consequences rather than by normative criteria. For an excellent review, see Scheffer, David, The Ethical Imperative of Curbing Corporate Tax Avoidance, *Ethics & International Affairs* 27(4), 2013, available [online](#).

¹²⁶ Development of an anti-avoidance doctrine in law.

See Fisher, Jasmine, Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility, *Boston University Law Review* 94(3), 2014, available [online](#).

¹²⁷ See Gutuza, Tracy, Has Recent United Kingdom Case Law Affected the Interplay between Place of Effective Management and Controlled Foreign Companies, *South Africa Mercantile Law Journal* 24, 2012, available [online](#).

¹²⁸ For an unusually lucid (even if somewhat dated) account, see Romano, Roberta, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, *Yale Law & Econ Research Paper* 297, 2004, available [online](#).

complexity – and thus confusion. Even as early as 2001, the US and others’ experience has shown that principles-based regulation represents the best way to apply these doctrines.¹²⁹

How can the presumption of disclosure/transparency enter Hong Kong’s administrative – and thus general – law? In line with the presumption of transparency, Hong Kong’s professional bodies and associations (like the Law Society, the Hong Kong Institute of Certified Public Accountants and the Hong Kong Institute of Chartered Secretaries) could encourage transparency – rather than confidentiality – as a corporate governance ‘default position.’¹³⁰ Rules for the professions should encourage these professions to provide advice which enhances – rather than hinders – transparency. The Mossack Fonseca case threw the transparency of professional service firms themselves into the spotlight – as just another case of “gatekeeper failure.”¹³¹ Government regulators should not discourage professional services firms – through these associations or directly -- from offering advice on tax or regulatory avoidance – as self-interest will always drive companies to hire advisors.¹³² Instead, we note better governed firms – including professional services firms – engage in less avoidance, using loopholes and skirting the law.¹³³ Thus, as professional associations and bodies (or “gatekeepers as American scholars call them”) encourage transparency and good corporate governance, such work will discourage the kind of activities which represent reputation risks for intermediaries and their clients.¹³⁴ Administrative rules should make Hong Kong’s civil servants expect such disclosure/transparency – adding to such a presumption of transparency.¹³⁵ Principles-based regulation represents a key way to shape civil servants’ expectations, for transparency as well as other conduct like companies’ acting based on legitimate economic purposes.¹³⁶

¹²⁹ See Zelenak, Lawrence, Codifying Anti-Avoidance Doctrines and Controlling Corporate Tax Shelters, *Southern Methodist University Law Review* 54, 2001, available [online](#). See also The organic development of new administrative law principles need not follow the US experience of overly trying to systematize such change. See Metzger, Gillian and Kevin Stack, Internal Administrative Law, *Michigan Law Review* 115(8), 2017, available [online](#).

¹³⁰ Such transparency clearly represents a social good – as such transparency helps all professional service providers, even if such transparency temporary puts one at a competitive disadvantage. For evidence, see Brivot, Marion, Controls of Knowledge Production, Sharing and Use in Bureaucratized Professional Service Firms, *Organization Studies* 32(4), 2011, available [online](#).

¹³¹ Stopping the cycles of such failure will require structural changes in the way these gatekeeping professional services firms share information. See Coffee, John, Understanding Enron: "It's About the Gatekeepers, Stupid", *The Business Lawyer* 57(4), 2002, available [online](#).

¹³² Indeed, these advisors should encourage better corporate governance – given repeated findings that better corporate governance constitutes an excellent tax avoidance scheme. See Kiesewetter, Dirk and Johannes Manthey, The Relationship between Corporate Governance and Tax Avoidance – Evidence from Germany using a Regression Discontinuity Design, *Arqus Quantitative Research in Taxation Discussion Paper No. 218*, 2017, available [online](#).

¹³³ For more proof, see Kerr, Jon, Richard Price and Francisco Roman, The Effect of Corporate Governance on Tax Avoidance: Evidence from Governance Reform, 2016, available [online](#).

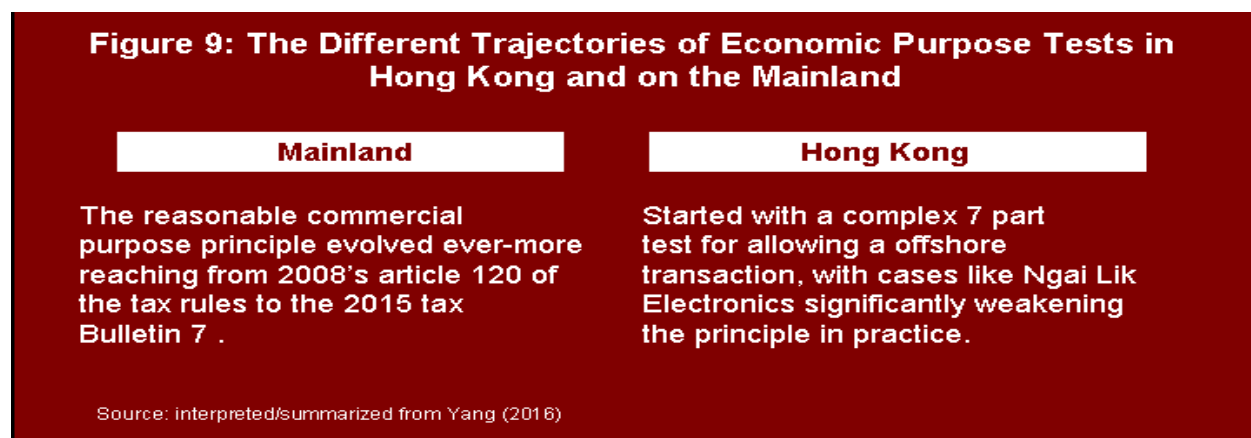
¹³⁴ Shepherd, Kevin, Guardians At The Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers, *Real Property, Trust and Estate Law Journal* 43(4), 2009, available [online](#).

¹³⁵ Hong Kong’s own administrative rules right now governing such transparency hardly represent a paragon for others to follow...providing yet one more reason why administrative law reform must come first. For the difficulties in adopting these kinds of rules, see Sawyer, Adrian, Hong Kong’s Involvement With International Tax Reform: What’s the ‘BEPS’?, *AIIFL Working Paper No. 21*, 2017, available [online](#).

¹³⁶ For concrete examples, see Kettl, Donald, The Transformation of Governance: Globalization, Devolution, and the Role of Government, *Public Administration Review* 60(6), 2000, available [online](#).

How Far Can the Regulatory Test for Legitimate Economic Purposes Go?

The legitimate economic purpose test represents one of the clearest, and most commonly known, principles by which administrative law defines the tax reporting obligations of firms.¹³⁷ While the test itself does not comprise administrative law, the way that civil servants interact with the test does.¹³⁸ The Hong Kong tax code requires tax assessors to consider “the form and substance of the transaction” (much like the Mainland rules) and the intent (whether for reasonable commercial purposes or simply to obtain a tax benefit).¹³⁹ While Hong Kong’s tax code has not adopted the reasonable commercial purpose language, its “dominant purpose” test basically serves the same purpose.¹⁴⁰ As shown in Figure 9, Yang provides a fascinating account of the way the “reasonable commercial purposes” test evolved in Hong Kong and on the Mainland.¹⁴¹ On the Mainland, the tax authorities over time expanded their ability to apply the test. In contrast, the principle in Hong Kong bifurcated into seven sub-tests and Hong Kong’s courts weakened the provision by ruling against the tax authorities on numerous occasions. Despite Hong Kong’s hostility to applying a “reasonable commercial purposes test,” the principle is not foreign to Hong Kong law and practice.



¹³⁷ If administrative law represents the unloved cousin of public law, then tax law represents the unloved child of that administrative law. For even an acknowledgement that tax issues comprise a practically, as well as academically, interesting part of administrative law, see Grewal, Amandeep, Taking Administrative Law to Tax, *Duke Law Journal* 63(8), 2014, available [online](#).

¹³⁸ The problem runs deeper than most realise. The application of this test – or indeed any legal test – butts up against the slippery nature of the transnational corporation (as a shell company or otherwise). The practical impossibility of applying Hong Kong law to such a transnational entity makes rulemaking precarious at best – much less rules about applying such rulemaking. For a questioning of the legal foundations of such an administrative law, see Johns, Fleur, The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory, *Melbourne University Law Review* 19, 1994, available [online](#).

¹³⁹ See Inland Revenue Ordinance, CAP. 112, at art. 61a. The rule does not require or define the principles of a legitimate commercial purpose test like the one we describe in this article. We thus interpret the converse of structuring a transaction or party to obtain a tax benefit as a legitimate commercial purpose.

¹⁴⁰ IRD, Departmental Interpretation and Practice Notes NO. 15(Revised), 2006, at para 33, available [online](#).

¹⁴¹ Yang, Ya-Ting, China (People's Rep.)/Hong Kong: A Comparative Study of the General Anti-Avoidance Rules of Mainland China and Hong Kong – Legislation, Interpretation and Application, *Bulletin for International Taxation* 70(7), 2016, available [online](#).

The introduction of a legitimate economic purpose test into Hong Kong's administrative law would help pave the way for principles-based approaches. Specifically, lawmakers and regulators could introduce the test into Hong Kong's tax code, listing rules and in financial service provider/intermediaries' risk profiles. Section 61 of the Inland Revenue Ordinance allows the tax authorities to assess extra taxes for "any transaction which reduces or would reduce the amount of tax payable by any person [if] artificial or fictitious."¹⁴² The three sub-articles basically apply a legitimate economic purpose test by targeting "transactions designed to avoid liability for tax" (article 61a), "utilization of losses to avoid tax" (section 61b) and "avoidance arrangement of no effect" (section 61c).¹⁴³ Making such a legitimate economic purpose test more explicit in those articles would help ensure that businesses understand the logic behind the prohibitions contained in those articles. Civil servants would also adopt the habit of evaluating the ends of government action – rather than means. Similarly, any intermediary transacting with a company whose structure obviously lacks a legitimate economic purpose (like a manufacturer or service provider incorporated in the Bahamas) clearly should represent a higher commercial risk.¹⁴⁴ The Hong Kong Stock Exchange's listing rules could furthermore require a local incorporation or incorporation in the jurisdiction where the listed company makes and/or sells its goods and services.¹⁴⁵ The goal consists of introducing the broader method of regulating by principles – rather than simply "silo-ing" the use of such regulations to particular situations.¹⁴⁶

Hong Kong's comply-or-explain culture of corporate governance – basically a principles-based test – shows Hong Kong regulators' experience imposing these kinds of regulations on companies. Unlike minimalist regulations, comply-or-explain regulations strive to provide the flexibility to react appropriately to market circumstances, while still following guidelines for good corporate governance – basically the same kind of goal as a legitimate economic purpose test (or any other test).¹⁴⁷ Following such an approach, businessmen actually help civil servants understand and apply regulation, in a way that minimally intrudes on the company.¹⁴⁸

¹⁴² Inland Revenue Ordinance, sec. 61, 1986/2012, available [online](#).

¹⁴³ Id.

¹⁴⁴ Many experts have documented the risks of transacting with offshore entities – in the lack of recourse to certain laws (like bankruptcy law) and anonymity which stifles accountability. See Global Witness and Global Financial Integrity, *Chancing It: How Secret Company Ownership is a Risk to Investors*, 2016, available [online](#).

¹⁴⁵ Even if the exchange and companies do not completely adhere to the rule, at least the jurisdictions of incorporation will show more variation than at present (as shown in figure 59). For a look at the US's offshore-incorporated listed firms, see SEC, *Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission*, 2014, available [online](#).

¹⁴⁶ Lawmakers and senior public officials themselves should not (and probably can not) 'silo' such a results-based approach, for use when traditional administrative law does not work. A paradigm change is a paradigm change. For a proposal for such silo-ing, see Craig, Robin, J. Ruh, Eleanor Brown and Byron Williams, *A proposal for amending administrative law to facilitate adaptive management*, *Environmental Research Letters* 12(7), 2017, available [online](#). For a more developed expression of this, see Craig, Robin and J. Ruhl, *Designing Administrative Law for Adaptive Management*, *Vanderbilt Law Review* 67(1), 2014, available [online](#).

¹⁴⁷ Indeed, the minimalist school – whereby civil servants exercise discretion in cases where regulated parties to do not act according to established principles -- has evolved into the more nuanced view we provide in this article. For the predecessor views, see Sabel, Charles and William Simon, *Minimalism and Experimentalism in the Administrative State*, *Georgetown Law Journal* 100, 2012, available [online](#).

¹⁴⁸ For evidence and further arguments, see Aguilera, Ruth, Alvaro Cuervo-Cazurra, *Codes of Good Governance Worldwide: What is the Trigger?*, *Organization Studies* 25(3), 2004, available [online](#).

In theory, comply or explain rules can actually support a legitimate economic purposes test. As we have shown, complex and opaque offshore structures harm shareholder value and allow poor corporate governance practices to abound.¹⁴⁹ If such offshore structures actually produce real and substantial benefits, these companies should explain them to the public – as required by Hong Kong’s code of corporate governance.¹⁵⁰ Indeed, such disclosures may well help academics and policymakers better understand the benefits of allowing such offshore incorporations.¹⁵¹ One way to do this consists of introducing an explicit “legitimate economic purpose test” in article 61/61a into the Inland Revenue Ordinance (during the next major legal revision), in offshore listings, and in risk profiling clients/partners. Similarly, regulators at the Hong Kong Stock Exchange and the Securities and Futures Commission could add a provision to the Hong Kong Code of Corporate Governance requiring companies to confirm that the jurisdiction they have incorporated in matches the firm’s economic purpose, or explain why not. Both of these changes would encourage companies (and their regulators) to focus on final economic purposes – while offering flexibility in cases where other business needs dominate.¹⁵²

Other innovations in tax law might help inspire changes to the broader legal framework in the fight against corporate maladministration. Notably, Hong Kong’s adoption of anti-abuse doctrines in its tax sphere might usefully serve to promote better corporate governance in the listing sphere. Hong Kong is a member of an OECD group working on regulations designed to stop treaty abuse that Mossack Fonseca’s clients exploited so widely.¹⁵³ That forum uses the term Principal Purpose Test as a rough equivalent to the reasonable commercial purpose test we described previously.¹⁵⁴ Yet, at present, the Securities and Futures Commission’s authorisation for companies incorporated abroad to list and transact in Hong Kong depends more on rule-

¹⁴⁹ Numerous academic studies find that shareholders would balk at offshore incorporations if given the chance. Such results confirm our own conclusions – as such incorporations can kill shareholder value. See Johnson, Holub, Questioning Organizational Legitimacy: The Case of U.S. Expatriates, *Journal of Business Ethics* 47(3), 2003, available [online](#).

¹⁵⁰ A number of academics argue in favour of leaving offshore incorporations unregulated. Yet, if disclosure and transparency help markets to work better, these authors should not object to full public disclosure of the benefits these offshore structures endow. See Fisch, Jill, Leave It to Delaware: Why Congress Should Stay out of Corporate Governance, *Delaware Journal of Corporate Law* 37, 2013, available [online](#). See also Kamar, Ehud, Beyond Competition for Incorporations, *Georgetown Law Journal* 94, 2006, available [online](#).

¹⁵¹ We understand very poorly the benefits of offshore incorporation (besides the obvious tax benefits). For a discussion of this lack of understanding, see Buckley, Peter, Dylan Sutherland, Hinrich Voss, Ahmad El-Gohari, The Economic Geography of Offshore Incorporation in Tax Havens and Offshore Financial Centres: The Case of Chinese MNEs, *Journal of Economic Geography* 15(1), 2015, available [online](#).

¹⁵² This approach contrasts with other attempts to reframe administrative law, such as the German *Neue Verwaltungsrechtswissenschaft*, which claims to look at the very foundations of such rulemaking itself. See Vosskuhle, Andreas and Thomas Wischmeyer, The ‘Neue Verwaltungsrechtswissenschaft’ Against the Backdrop of Traditional Administrative Law Scholarship in Germany, In Rose-Ackerman, Susan and Peter Lindseth (eds.), *Comparative Administrative Law*, Edward Elgar Publishing, 2017.

¹⁵³ The G20/OECD Base Erosion and Profit Shifting Project has developed common regulations aimed at reducing the tax loopholes which incentivize poor corporate governance on the Mainland as elsewhere. See OECD, BEPS Actions, 2016, available [online](#). For a list of members, see OECD, Inclusive Framework Composition: BEPS Members, 2016, available [online](#).

¹⁵⁴ In that context, lawmakers seek to regulate the holding companies whose structures muddy corporate relationships and reduce transparency to the outside world. See Juliana Dantas, Henny Verboom and Stephan Behnes, BEPS action 6: Preventing treaty abuse - a threat to holding structures? 2016 available [online](#).

following rather than the actual purpose and result of these rules.¹⁵⁵ As the SFC's Joint Policy Statement regarding the listing of overseas companies from September 2013 notes, the "Listing Rules require an overseas company to demonstrate that its jurisdiction of incorporation has shareholder protection standards at least equivalent to those of Hong Kong. If this is not possible, overseas companies can achieve equivalent standards by varying their constitutive documents to provide them" (underlining ours).¹⁵⁶ For the BVI specifically, the HKEx Country Guide finds – in granting authorisation for BVI companies to list in Hong Kong, that "we do not consider BVI's shareholder protection standards to be materially different to our own."¹⁵⁷ As described in Figure 10, the HKEx (and SFC for that matter) have broad discretion over the recognition of foreign corporate governance and other standards. They do not describe the extent to which risk assessment (rather than simple compare-and-contrast of law) plays a role in determining who can list. Would a simple principle or test make such a determination more predictable and transparent than no standard at all?

Figure 10: Who Empowers the Exchange to Regulate Foreign Companies Listed in Hong Kong?

Where does the Hong Kong Stock Exchange's authority to regulate foreign-listed companies come from? This so far academic question has practical applications if Hong Kong is to adopt more corporate-governance-friendly listing rules covering foreign companies (especially from the Mainland). The Securities and Futures Ordinance gives the Securities and Futures Commission the power to deal with foreign regulators and authorities.* A Memorandum of Understanding delegates that authority to the Hong Kong Stock Exchange to regulate day-to-day listing matters and trading.** Yet, just how far does that authority extend? Can the Exchange travel to these companies abroad and make determinations about corporate governance-related matters? Do certain types of SFC agreements with foreign authorities represent 'international relations?' (a political question to be sure) as prohibited in Hong Kong's Basic Law.

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¹⁵⁵ For a list of countries (and the extra rules needed for each), see SFC, List of Acceptable Overseas Jurisdictions, 2016, available [online](#).

¹⁵⁶ See SFC and HKEx, Joint policy statement regarding the listing of overseas companies, 2013, available [online](#).

¹⁵⁷ See HKEx, Country Guide – British Virgin Islands, 2014, available [online](#).

Figure 61 (continued): Who Empowers the Exchange to Regulate Foreign Companies Listed in Hong Kong?

We do not have the space to do a full analysis here. Tradition has clearly sided with the HKEx imposing these rules.*** Why does the authority to recognise other jurisdictions' corporate governance standards fall to the SFC and the HKEx? Why don't foreign companies listed on the exchange have so few rights to take decisions about the Exchange and its policies when they constitute over 40% of listing companies? Why does listing in Hong Kong give the Hong Kong government the right to determine the corporate governance standards of foreign companies operating in foreign jurisdictions? While we base our recommendations on the common understanding of existing law, the legal purist may feel very uneasy with the authority the HKEx (and even the SFC) use to justify regulating foreign companies listed in Hong Kong.

* Securities and Futures Ordinance at 5(1.h) available [online](#)

** Memorandum of Understanding Regarding Listing Matters, at 2.4 available [online](#).

*** The Hong Kong Stock Exchange represents one of the Hong Kong Exchanges and Clearing Limited's subsidiaries.

What specific rules might encourage a focus on the overall economic purposes of corporate activity? The Panama Papers pointed to four practices in particular that undermine corporate governance in the wider business environment.¹⁵⁸ First, rules that allow or encourage mailbox company colonies (or large numbers of corporations based out of a mail centre or building in which none of these companies' economic activity occurs).¹⁵⁹ Second, rules requiring foreign-only operation of companies (namely companies incorporated in a particular jurisdiction are forbidden from operating in that jurisdiction).¹⁶⁰ If these jurisdictions consider the company unfit to operate within their borders, why would they consider them more fit to operate abroad? Third, domestic rules allow for directors meetings with individuals who have no knowledge of the companies they supposedly govern and shareholder meetings conducted as a formality without any important company policies or decisions being discussed. Fourth, rules that allowing for the sale and subsequent operation shelf companies – as these shelf companies obviously had no legitimate economic purpose when incorporated. These rules have traditionally corresponded with companies having poor/little actual corporate governance – and provide ways for corruption and fraud to undermine corporate governance in larger, more established companies on the Mainland and elsewhere.¹⁶¹ Yet, rather than simply banning transactions with these kinds of

¹⁵⁸ Alibaba (a Chinese technology company) illustrates the risks and potential harms of non-transparent governance of an offshore incorporation entity. See Lin, Yu-Hsin and Thomas Mehaffy, Open Sesame: The Myth of Alibaba's Extreme Corporate Governance and Control, *Brooklyn Journal of Corporate, Financial & Commercial Law* 10, 2016, available [online](#).

¹⁵⁹ Numerous stories and studies have shown that these mailbox company colonies aim to avoid taxation rather than to enable more productive corporate operations. For a recent case where authorities required changes to complicated governance structures, see Drucker, Jesse and Jeremy Kahn, U.K.'s Tax Deal With Google Wasn't Just About Offshore Havens, *Bloomberg February*, 2016, available [online](#).

¹⁶⁰ Under the International Business Companies Act, BVI companies are "ring fenced" – meaning they can not conduct business domestically. Numerous studies show the harms of these provisions. See Schjelderup, Guttorm, Secrecy jurisdictions, *International Tax and Public Finance* 23(1), 2016, available [online](#).

¹⁶¹ Williams explains why authorities like Hong Kong's need to focus on regulatory consequences as well as conduct-effects. -- as offshore financial centres modify their financial services to avoid tightening regulation world-wide. The only successful approach, in light of such market adaptation, requires moving away from looking at paper

entities, a “non-administrative” administrative law would allow such transactions if they served a legitimate economic purpose.

Naturally, shell and shelf companies pose significant risks to corporate governance in Hong Kong and outside.¹⁶² If judged by media reports, the dire current situation begs for additional regulation. These reports claim that 40% of the 22 companies listed on Hong Kong’s stock exchange (on the main board) for the three month period ending in February 2016 consisted of shell companies.¹⁶³ Share price volatility of these listed shell companies make the harms to equity markets and corporate governance in general obvious – with 56 companies’ valuations increasing by more than 1,000% between 2013 and 2015, despite 39 of them losing money.¹⁶⁴ Few can document the corporate governance practices of many shell companies that have other shell companies as directors and shareholders.¹⁶⁵ Hong Kong’s disclosure regime should thus include shell companies, special purpose vehicles and the companies that work with them...something which anyone acting with an eye toward increasing transparency can not avoid concluding.¹⁶⁶

Hong Kong’s code of corporate governance should introduce a special section for offshore, shell/shelf, special purpose vehicles and conduit companies. Numerous studies have documented both the good and bad sides of using these kinds of structures.¹⁶⁷ Most authors argue that regulators should not try to “fix” these structures – but rather increase their transparency.¹⁶⁸ Requiring that special purpose vehicles have a unique designation (like SPV rather than Ltd. or Inc.) can help ensure parties understand the nature of the entity they do business with. If these entities truly are companies, then why do they not issue the same large corporate governance reports as the traded entities that use them? Numerous studies have described how to modify accounting and reporting procedures for these entities.¹⁶⁹

rules. See Williams, Thomas, International Pressure Makes Offshore Lawyers Change Tack, *International Financial Law Review* 21(24), 2002, available [online](#).

¹⁶² We do not have space to list these harms. See Global Financial Integrity and Global Witness, Chancing It: How Secret Company Ownership is a Risk to Investors, 2016, available [online](#).

¹⁶³ See Yam, Shirley, Hong Kong’s Red-Hot Corporate Shell Game is Cause for Concern. *South China Morning Post February*, 2016, available [online](#).

¹⁶⁴ Robertson, Benjamin, Jeanny Yu and Eduard Gismatullin, The Magical Transformation of Hong Kong’s Listed Companies, *Bloomberg July*, 2016, available [online](#).

¹⁶⁵ Zarroli, Jim, Want To Set Up A Shell Corporation To Hide Your Millions? No Problem, *NPR April*, 2016, available [online](#).

¹⁶⁶ Even common sense would lead businessmen to know more about their customers. For evidence about the widespread abuses of the current opaque system, see Findley, Michael, Daniel Nielson and Jason Sharman, Global Shell Games: Testing Money Launderers’ and Terrorist Financiers’ Access to Shell Companies, *Centre for Governance and Public Policy Working Paper*, 2012, available [online](#).

¹⁶⁷ Ahlawat and co-authors in particular describe the pros and cons of these structures, along with their lack of transparency, particularly well. See Ahlawat, Sunita, Danielle Bolomo and Kyle Ropp, Whether Sensible Business Tool or Deceptive Scheme to Conceal, the Special Purpose Entities Are Here to Stay, *Accounting and Finance Research* 3(2), 2014, available [online](#).

¹⁶⁸ Newman in particular represents one voice in this camp. See Newman, Neal, Enron and the Special Purpose Entities-Use or Abuse-The Real Problem-The Real Focus, *Law and Business Review of the Americas* 13, 2007, available [online](#).

¹⁶⁹ Our paper – focused on corporate governance – does not try to discuss the accounting and reporting rules around these entities. For more, See Basel Committee on Banking Supervision, International Organisation of Securities Commissions, and International Association of Insurance Supervisors, Report on Special Purpose Entities, 2009, available [online](#).

Four amendments to the Code of Corporate Governance in particular could help reinforce the idea of focusing on final economic purposes. First, Hong Kong’s policymakers could introduce rules in the Listing Rules companies from jurisdictions (or companies which transact with them) which require additional due diligence and a classification as a high risk entity if that company’s jurisdiction allows or encourages: a) mailbox company colonies, b) foreign-only operation and c) directors and shareholder meetings with individuals having little knowledge of the companies they affiliate with, and d) sale and operation of shelf companies. Second, they could introduce a provision in the Code of Corporate Governance to require companies conducting any transactions with a shell company, offshore company from the BVI, Cayman Islands, Bahamas, or other jurisdictions decided by the HKEx to disclose such business and the nature of that business. Third, they could require SPV at end of company name (like Limited) to designate that the entity is a special purpose vehicle. Fourth, they could require offshore, shell/shelf, special purpose vehicles, and “hollow” holding companies to issue corporate governance reports outlining their operations in the same way that normal companies do. These activities would increase transparency, rather than setting fixed proscriptive or restrictive rules.

Stepping back, the Panama Papers experience teaches us that the Exchange should regulate the practices of shareholder protection rather than simply standards. Clearly, the legitimate economic purpose test and anti-abuse provisions we discussed previously focus more on intent and action – rather than just written regulations and policies. The SFC and HKEx should focus more on practice in foreign jurisdictions and by foreign companies than on their printed policies. The easiest way to introduce such changes into the way we relate to (and regulate) companies’ behaviour abroad consists of amending the Joint Statement, so that the second paragraph reads: “Listing Rules require an overseas company to demonstrate that its jurisdiction of incorporation has shareholder protection standards **and practices** at least equivalent to those of Hong Kong. If this is not possible, overseas companies can achieve equivalent standards **and practice** by varying their constitutive documents **as well as governance and enforcement practices** to provide them” (bold our additions).¹⁷⁰

Conclusion

The Panama Papers clearly show the need for Hong Kong’s lawmakers and regulators to adopt rules encouraging better corporate governance. Judging by the past, Hong Kong’s financial, corporate, tax and other regulations have failed to prevent the abuses identified in the Panama Papers. Yet, these failures tell us something more general about Hong Kong’s administrative law – and its weaknesses. Effective regulations need to focus on ends, not means. Administrative law which focuses on these ends encourages public officials, civil servants, and even inspectors to focus on these ends. Administrative law affects the way companies regulate themselves (both through self-governing associations and in their own internal rules).

We illustrated how a new approach to administrative law could encourage good corporate governance in several areas. Public officials’ action can affect and incentivize the ranking/rating of corporate governance practices. They both require and expect a certain disclosure.

¹⁷⁰ SFC and HKEx, Joint policy statement regarding the listing of overseas companies, 2013, at para 2, available [online](#). The bold words and phrases represent our suggested additions.

Administrative law can make both ratings and disclosures the default norm, in government as well as in business alike. Principles-based rules focused on ends can also set a positive example – and a level of expectation -- for self-regulating professions. No one could dispute that companies should pursue legitimate economic purposes. They should not unnecessarily avoid paying taxes. Corporations should also not withhold information simply because they can. If econometric evidence shows the benefits of good corporate governance, “non-administrative” administrative law (as we have defined it in this paper) represents the way that civil servants and regulators can encourage companies to follow such good governance. If other areas of the public administration work like corporate regulation, then perhaps it is time to rethink the way we write administrative rules.